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No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Petitioner,

v.

LAURENCE G. RUSSELL, WILLIAM L. HANNA, AND EDDIE D. LANGWELL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUE PRESENTED

This petition presents the following issue:

1. Does a decision of the National Mediation Board dismissing, after investigation, a representation application filed by an individual pursuant to Section 2, Ninth of the Railway Labor Act, upon the basis of the uncontested fact that the individual seeks certification by the Board as a representative of an already represented craft or class of employees of a carrier subject to the Act, solely for the purpose of terminating the collective bargaining agreement governing such employees and their status as represented employees, constitute a gross violation of a specific statutory command of that Act so as to subject the Board's action to judicial review?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"], respectfully prays that a writ of certiorari issue to review the final judgment and decree of the United States Court of Appeals for the Fifth Circuit reversing a decision of the United States District Court for the Northern District of Texas, Amarillo Division, granting the National Mediation Board [hereinafter, "Mediation Board"] summary judgment on the complaint of respondents Laurence G. Russell, *et al.*, and dismissing said complaint, which sought to invalidate the action of the Mediation Board in dismissing a representation application of respondent Russell filed with the Board pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) to certify respondent Russell as the representative of the craft or class of certain Police Officer

employees of the Atchison, Topeka and Santa Fe Railway Company [hereinafter, "Santa Fe"], so that he could then terminate such representation and the collective bargaining agreement governing the rates of pay, rules, and working conditions of said employees.

OPINIONS BELOW

The opinion of the Court of Appeals, reproduced as Appendix A hereto,[1] is reported at 714 F.2d 1332 and styled *Laurence G. Russell, William L. Hanna and Eddie D. Langwell* v. *National Mediation Board, the Atchison, Topeka and Santa Fe Railway Company, et al.* The decision of the District Court, (App. B hereto) is reported only in 110 LRRM 2167.

JURISDICTION

The decision of the Court of Appeals was entered on September 22, 1983 (App. A hereto). A petition of the petitioner BRAC for rehearing and the suggestion of petitioner for Rehearing En Banc were denied by the Court of Appeals on November 28, 1983 (App. C hereto). This petition is governed by the provisions of Title 28, Sections 1254(l) and 2101(c) of the United States Code and Rule 20(2) of the Revised Rules of this Court which require the petition to be filed within ninety (90) days after the entry of the final judgment or decree of the Court of Appeals.

STATUTORY PROVISIONS INVOLVED

This case primarily involves the provisions of Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) providing for the resolution by the Mediation Board of disputes among the employees of a carrier subject to the Act as to who

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[1] The Appendix is hereinafter referred to as "App.".

are the representatives of such employees. The section reads as follows:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

The case also involves Sections 1, Sixth, 1a, 2, First, Second, Fourth, and 6 of the Railway Labor Act (45 U.S.C. §§ 151, Sixth, 151a, 152, First, Second, Third, Fourth and 156). These provisions are quoted in full in App. D hereto and pertinent portions thereof are also quoted at appropriate places in this petition. The complaint also alleged that the Mediation Board action violated the rights of respondents to freedom of association under the First Amendment to the United States Constitution as well as their Fifth Amendment rights. The provisions of these amendments are also reproduced in Appendix D hereto.

STATEMENT OF THE CASE

This case began on March 23, 1981, when Laurence G. Russell filed an application with the Mediation Board pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) alleging the existence of a representation dispute involving special agents and security guards employed by the Santa Fe, a railroad subject to the provisions of the Act (App. E hereto). Such employees generally constitute the craft or class of Police Officers below the rank of Captain. Such employees were represented by petitioner BRAC.

Section 2, Ninth of the Railway Labor Act, quoted in full, *supra*, page 3, provides that upon the request of either party to a dispute among employees of a carrier subject to the Act, "as to who are the representatives of such employees designated and authorized in accordance with the requirements of the Act," the Mediation Board, a Federal agency created by Section 4 (45 U.S.C. § 154) of the statute, shall investigate and certify the name or names of the individuals or organizations designated or authorized to represent the employees involved in the dispute. The section authorizes the Board to conduct an election or "to utilize any other appropriate method" of ascertaining the employee representative to be certified. Upon certification of an employee representative by the Mediation Board, the employer railroad is required to "treat" with such representative. This requirement constitutes a command to the employer to act affirmatively to bargain exclusively with the certified representative with respect to rates of pay, rules, and working conditions of the employees involved. *Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 (1937).

The Mediation Board conducted the investigation of the dispute alleged in Mr. Russell's application as required by Section 2, Ninth, in which BRAC participated as the duly certified representative of the employees involved, and on May 21, 1981, issued its "Findings Upon Investigation, Dismissal" of the application (App. E-1 hereto). This decision is reported

at 8 NMB No. 135 (1981). The dismissal was based upon two basic findings.

First: the Mediation Board found that an application for certification as an employee representative is void *ab initio* where the applicant lacks the intent to represent the craft or class, if certified. This finding reads as follows:

> The Railway Labor Act, unlike the National Labor Relations Act, contains no statutory provision for decertification of a bargaining representative. *Atchison, Topeka and Santa Fe Railway Company*, 8 NMB No. 18 (1980). *See also, Manufacturers Railway Company*, 7 NMB Nos. 233 and 250 (1980). The Board will not progress an application for investigation of a representation dispute where the applicant lacks the intent to represent the craft or class, if certified. *Chicago Union Station*, 8 NMB No. 45 (1980), and will dismiss such an application because it is void *ab initio*.

(App. E-1 at 46a).

Second: The Mediation Board found that applicant Russell lacked the intent to represent the class or craft of employees involved. This finding reads as follows:

> The Board finds that Laurence G. Russell lacks an intent to represent the subject craft or class if elected and certified, as evidenced by his announced and undisputed plan to abrogate all existing collective bargaining agreements, thereby leaving the employees unrepresented *in effect*, notwithstanding the certification and the obligations which attach thereto.

(App. E-1 at 47a). The Board also found that respondent Russell's objective of achieving "exempt" status for the employees involved as set forth in cited documents was erroneous because there was no such status under the statute, and thus simply meant decertification. This factual finding was supported by documents, including letters signed by Mr. Russell, and a statement of counsel for the applicant to the Mediation Board's Chief Hearing Officer. Among the cited documents were letters from the applicant Russell to United States Senators and a Member of the House of Representatives advising that Mr. Russell's objective was "to negotiate an agreement to termi-

nate the collective bargaining agreement then in effect and thereafter to refrain from engaging in further representation of the employees."

Mr. Russell has not contested the factual accuracy of the Mediation Board's findings in the subsequent litigation with respect to its decision.

On July 7, 1981, Mr. Russell, along with Messrs. William L. Hanna and Eddie D. Langwell, two other Santa Fe employees, filed a two count complaint in the District Court against the Mediation Board, the Santa Fe, and petitioner BRAC. On July 23, 1981, the plaintiffs filed an amended complaint (App. F hereto). The first cause of action in the amended complaint alleged that the Mediation Board action in dismissing the representation application was unlawful, arbitrary, capricious, an abuse of discretion in excess of its statutory jurisdiction, and violative of the First and Fifth Amendment rights of plaintiffs under the United States Constitution. The amended complaint also alleged that the Railway Labor Act was unconstitutional as applied to plaintiffs. The complaint prayed that the District Court order a representation election or utilize another appropriate method of ascertaining the duly authorized representative of the employees involved.

The second count of the complaint repeated the allegations of the first count and added a claim that the union security provisions of the collective bargaining agreement between the Santa Fe and BRAC was violative of plaintiffs' rights of freedom of association guaranteed by the First Amendment to the United States Constitution and prayed for a court order to enjoin the enforcement of the union security agreement.[2]

The defendants Mediation Board and BRAC filed answers to the amended complaint alleging that it did not state a cause of action upon which relief could be granted; that the District

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[2] A copy of the amended complaint is attached as App. F.

Court lacked jurisdiction over the subject matter of the amended complaint; and denying any unlawful action. (App. G and H). The Santa Fe filed an answer denying any illegal activity. The amended complaint against the Santa Fe was dismissed by the District Court on August 20, 1982. (App. B hereto).[3]

The National Mediation Board filed a motion for summary judgment with the District Court, which was granted by that Court on March 17, 1982, on the ground that the District Court had no jurisdiction to review and set aside the Board's order dismissing the representation application (App. B hereto). The District Court's decision found that: (1) it is well established law that Mediation Board representation decisions under Section 2, Ninth are not subject to judicial review with two limited exceptions not here applicable *i.e.*, (a) where the Board has acted in excess of its power or contrary to statutory provisions, and (b) where there are constitutional grounds therefore; (2) the Mediation Board's investigation as to whether a representation dispute existed in the present case was sufficient and within its scope of authority; and (3) the Mediation Board's investigation met all due process requirements.

BRAC also filed with the District Court on March 18, 1982, a motion to dismiss the complaint or to grant BRAC summary judgment thereon, which was granted by that Court on August 22, 1982.

On September 7, 1982, respondents Russell, *et al.*, filed their notice of appeal of the District Court's order granting the motion of the Mediation Board for summary judgment. The notice of appeal did not include the District Court's order of August 22, 1982, dismissing the amended complaint as to BRAC (App. J hereto).

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[3] BRAC and the Santa Fe also filed cross claims and counterclaims against each other which were dismissed by agreement.

The Court of Appeals issued its decision reversing the District Court judgment on September 22, 1983. This decision found that the Mediation Board violated the statutory mandate of Section 2, Ninth of the Railway Labor Act by refusing to further progress respondent Russell's representation application because he was a "representative" within the meaning of Section 1, Sixth of the Railway Labor Act even though he sought certification as a representative in order to terminate the collective bargaining agreement governing the employees involved and end representation of such employees. The Court did not address respondents constitutional claim in light of its conclusion of a statutory violation. (App. A hereto)

BRAC filed with the Court of Appeals a timely petition for rehearing and a suggestion of rehearing en banc which were denied by the Court on November 28, 1983 (App. C hereto).[4]

The Court of Appeals also denied the BRAC motion for a stay of mandate.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Decision Reversing The District Court Raises Issues Of Substantial Importance In The Administration Of The Railway Labor Act Which Should Be Reviewed By This Court

The decision below held that the Mediation Board violated the mandate of Section 2, Ninth of the Railway Labor Act that it investigate representation applications and certify a "representative" thereunder by dismissing the Russell application

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[4] On October 10, 1983, the plaintiffs-respondents filed a motion with the Court of Appeals challenging the extension of time granted by the Court to BRAC to petition for rehearing and to file a suggestion of rehearing en banc on that ground. The challenge was based on a claim that BRAC, which had been a party in interest before the NMB, a defendant before the District Court, and fully participated as an appellee before the Court of Appeals, had no standing because plaintiffs-respondents did not desire to appeal the District Court's grant of summary judgment to BRAC. That motion was denied.

after the Board's investigation thereof revealed that it was the intent of the applicant to use certification to terminate representation of the employees involved in favor of an "exempt status" and to terminate the applicable collective bargaining agreement. The decision rests such conclusion on the ground that Mr. Russell was a "representative" of the employees involved within the meaning of Section 1, Sixth of the Railway Labor Act even though his clearly established intent was to terminate representation under the statute.

This conclusion is rendered within the context of a statute which, unlike the National Labor Relations Act, contains no provision for decertification of a statutory representative, which was passed by Congress for the stated purpose of providing, *inter alia*, for the prompt and orderly settlement of all disputes concerning grievances and rates of pay, rules, and working conditions (45 U.S.C. § 151a) and which provides for the implementation of such purpose by:

(a) requiring employees and carriers to make every reasonable effort to make and maintain agreements and settle all disputes between them (45 U.S.C. § 152, First);

(b) providing employees with the right "to organize and bargain collectively through "representatives" of their own choosing (45 U.S.C. § 152, Fourth);

(c) providing that the majority of a craft or class shall have the right to determine who shall be the "representative" of the craft of class *"for the purposes of this Act"* (45 U.S.C. § 152, Fourth) (Emphasis supplied);

(d) providing for the designation of "Representatives, *for the purpose of this Act*" without interference, coercion, or interference (45 U.S.C. § 152, Third) (Emphasis supplied);

(e) imposing a duty on the "representatives" thus chosen a duty of deciding, in conference with carrier representatives, all disputes between the parties (45 U.S.C. § 152, Fourth);

(f) by imposing a duty on the employee "representatives" in case of a dispute concerning grievances or interpretation or application of agreements ("minor disputes") to comply with specified requirements for conference with carrier representatives with respect thereto (45 U.S.C. § 152, Sixth);

(g) by imposing a duty in Section 6 (45 U.S.C. § 156) upon employee representatives to give written notice in accordance with statutory requirements of intended changes in agreements and confer with carrier representatives with respect thereto as the first step in the mandatory Railway Labor Act procedures of conference, and mediation by the Mediation Board under Section 5 during which periods the status quo must be maintained to prevent disruptions of commerce leading up to, where necessary, the appointment of a Presidential Emergency Board and/or efforts by the Mediation Board to obtain voluntary arbitration of the dispute pursuant to Section 2, Seventh. (45 U.S.C. § 152, Seventh)

Thus, when the Court below concludes that respondent Russell "intended to represent" the employees involved within the meaning of the Railway Labor Act since there are no qualifiers attached to the Act's simple definition of "representative" in Section 1, Sixth of that statute, the Court gives no significance to the provisions of Section 2, First, Second, Third, Fourth and Sixth which require a Railway Labor Act "representative" to be a person or organization designated "for the purposes of this Act," who must comply with the statutory duties imposed upon such an employee "representative," including the duty of making, maintaining and amending agreements, and handling disputes with respect thereto. In short, the decision below reads out of the Railway Labor Act all of the statutory duties of a "representative" of employees, which for some 60 years have been the heart of a statute passed to bring order out of chaos in labor relations in the railroad industry (subsequently extended to air transportation) in the public interest.

A decision which can have such a dramatic effect upon labor relations in rail and air transportation based on grounds which

conflict with all of the statutory purposes, which reverses the Mediation Board practices with respect to representation and which reads into the Railway Labor Act provisions of the National Labor Relations Act not included in the rail statute, should not be permitted to become the law of the land without review by this Court.

II. The Decision Below Conflicts With Established Principles Of Law Set Forth In Decisions Of This Court With Respect To The Exclusive Jurisdiction Of The Mediation Board In Representation Proceedings

It has been a settled principle of law established by decisions of this court for at least the past forty (40) years that the Congress in enacting and amending the Railway Labor Act gave the National Mediation Board the exclusive power and responsibility to determine matters arising out of the administration of Section 2, Ninth of the Railway Labor Act. *Switchmen's Union of North America* v. *NMB*, 320 U.S. 297 (1943); *General Committee* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323 (1943); *General Committee* v. *Southern Pacific Company*, 320 U.S. 338 (1943). In the *Switchmen's Union* case, which first articulated the extremely narrow and limited area of judicial review of Mediation Board determinations in representation proceedings, this Court stated:

> The act in Section 2, Fourth writes into law the 'right' of the "majority of any craft or class of employees" to determine who shall be the representative of the craft or class for purposes of this act. That 'right' is protected by Section 2, Ninth, which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held (citations omitted). A review by the Federal courts of the National Mediation Board's determination is not necessary to preserve or protect that 'right.' Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end.

Id. at 300-301.

This Court further stated that Congress in giving the National Mediation Board the exclusive right to enforce the "rights" created by the Railway Labor Act intended that *"the dispute was to reach its last terminal point when the administrative finding was made.* There was to be no dragging out the controversy into other tribunals of law." *Id.* at 305. (Emphasis supplied).

While the bar to judicial review of National Mediation Board determinations in representation disputes enunciated by the Supreme Court in *Switchmen's Union. id.*, has remained firm,[5] this Court subsequently recognized an extremely narrow limitation thereto. In *Leedom* v. *Kyne*, 358 U.S. 184 (1958), this Court upheld a District Court injunction setting aside a National Labor Relations Board (NLRB) election and certification where the NLRB had clearly acted "in excess of its delegated powers and contrary to a specific prohibition in the act." *Id.* at 184. The limitation of the *Leedom* v. *Kyne*, *supra*, "exception" to the bar of review of Mediation Board representation announced by this Court in *Switchmen's Union*, is set forth in it's decision in *Brotherhood of Railway Clerks* v. *Association for the Benefit of Noncontract Employees* (ABNE), 380 U.S. 650 (1965). In its decision in *ABNE*, *supra*, the Court reiterated the principle of the exclusive jurisdiction of the Mediation Board in representation matters, stating:

> That *Leedom* v. *Kyne* was no exception to *Switchmen's Union*. Rather the Court was careful to note that "this

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[5] See also e.g., *Sedalia-Marshall-Boonville Stage Line, Inc.* v. *N.M.B.*, 574 F.2d 394 (8th Cir. 1978), *cert. denied*, 439 U.S. 882 (1979); *Machinists* v. *N.M.B.*, 426 F.2d 527 (D.C. Cir.), *cert. denied*, 389 U.S. 912 (1967); *BRAC* v. *N.M.B.*, 374 F.2d 269 (D.C. Cir. 1966); *Teamsters* v. *N.M.B.*, 363 F.2d 311 (5th Cir.), *cert. denied*, 389 U.S. 920 (1966); *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913 (1964).

> suit is not one to 'review,' in the sense that the term is used in the act, a decision of the Board made within its jurisdiction, rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to specific prohibitions in the act" *Leedom* v. *Kyne*, 358 U.S. 184, 188.

Id. at 659-660. See also *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964). The Court, at page 660, also referred to the "narrow limits" and the "painstakingly delineated procedural boundaries of *Kyne*." The Court of Appeals for the District of Columbia Circuit in *International Brotherhood of Teamsters* v. *BRAC*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 768 (1968), stated that the Congressional purpose of ending representation matters with a Mediation Board finding may be fulfilled only if the courts are extremely chary of involving themsevles in NMB determinations and then went on to explain the narrow limits of judicial intervention in the following terms:

> *The narrow exceptions to the "jurisdictional" bar created by Leedom* v. *Kyne, and similar cases must be instances of constitutional dimension or gross violation of the statute.* The exception inevitably eliminates any strict concept of a lack of jurisdiction, since it permits a peek at the merits. The reconciliation of doctrine lies not in concepts but in practicalities. The retention of the doctrine negativing jurisdiction to consider the merits serves to confine the assertion of jurisdiction to cases where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language, without extension to "arguing in terms of policy and broad generalities as to what the Railway Labor Act should provide." As this court has written, the Board's action must be "so plainly beyond the bounds of the Act, or . . . so clearly in defiance of it, as to warrant the immediate intervention of an equity court." (Emphasis supplied).

Id. at 205.

In the instant case, the District Court found that the record clearly revealed that the NMB fully investigated the application filed by respondent Russell. The Board solicited and re-

ceived extensive position statements and numerous supporting documents from the respondents, petitioner BRAC and the Santa Fe, the employing carrier. The Board also received copies of letters sent by the respondents to their congressional representatives and the Board's chief hearing officer had a discussion with counsel for the Mediation Board regarding Mr. Russell's intentions. On the basis of this investigation the NMB made a finding, which was not challenged by the respondents, that Mr. Russell intended to "negotiate an agreement to terminate the collective-bargaining agreement then in effect, and to thereafter refrain from engaging in further representation of the employees." *In the Matter of the Application of Lawrence G. Russell*, 8 NMB No. 135, p. 472 (1981) (App. E-1 hereto). In light of this finding, the Board concluded that the applicant lacked the intent to represent the employees involved if elected and certified by the Board and intended to pursue a path of conduct resulting in these employees being unrepresented notwithstanding the certification and obligations which attached thereto, *Id.*, at 475. The District Court properly declined respondent's invitation to substitute its judgment for that of the Board either in the conduct of that investigaton, or in the Board's ultimate findings.

In summary, the District Court guided by the overwhelming case authority on the subject found that the Mediation Board's actions regarding representation applications under Section 2, Ninth of the Railway Labor Act are reviewable by the Federal courts only where there has been a substantial showing by the plaintiff that: (1) the Mediation Board's actions are contrary to specific prohibitions in the Railway Labor Act; or (2) that the constitutional rights of the applicant have been violated. The court correctly found based on the undisputed facts of record that neither exception was present in the case at bar.

The Court of Appeals recognized that there are narrow limits to any judicial review of Mediation Board decisions in representation cases which it characterized as permitting such review only in a case of "egregious errors." However, when that Court applied such principle to the instant case, it found

such error in the Board's interpretation of its duty under Section 2, Ninth of the Railway Labor Act on the basis of what the Court below described as a clear statutory mandate to the Board derived from the Court's interpretation of the word "representative" in Section 1, Sixth of the Statute. In so doing, the Court below, as pointed out in Section I above, ignored the fact that the statute always speaks of "representative" only as a person so designated for purposes of the Act and as the bearer of numerous duties, including that of making and maintaining agreements, processing grievances, and settling disputes in accordance with mandatory requirements of the statute. Thus, respondent Russell's application amounted to a request that the Board certify him as a representative so he could disregard all of the statutory requirements. The definition of a "representative" relied upon by the Court below as determinative of the reviewability of and reversal of the Mediation Board's decision dismissing the Russell application is that an employee "representative" under the Railway Labor Act is a person designated to act upon behalf of employees to accomplish anything they want to accomplish regardless of whether such desire serves the purposes and requirements of the Railway Labor Act or not. The decision below thus brings itself within the narrow confines established by this Court with respect to judicial review of Mediation Board representation decisions only by ignoring the purposes of the statute as enunciated by Congress as well as the purposes of representation specifically set forth in the cited statutory provisions. Such a decision also violates the clear principle of statutory interpretation established by this Court which requires that an interpreting Court not be guided by a single sentence or member of a sentence, but that a statute be read so as to give effect to the whole law and to its object and policy. *Philbrook* v. *Glodett*, 421 U.S. 707, 713 (1975). The conclusion of the Court below that the decision of the Mediation Board constitutes a gross or egregious violation of a statutory mandate opens wide the door to the destruction of the principles long ago established by this Court in *Switchmen's Union*, *supra*, 12.

The emphasis of the decision below on a right of the employees involved not to be represented for collective bargaining suggests that the Court of Appeals was lead into its untenable position by such consideration. However, given the absence of any statutory provision for decertification and the specific statutory provisions discussed above which negate the validity of the application of respondent Russell, the result produced by the Court below does violence to the statutory purposes of such provisions. Such a result is not necessary in light of this Court's decision in *ABNE*, *supra*, 13, in which the Court was faced with a claim for a "no union" place on a representation ballot to permit a no certification vote. The Mediation Board rejected such a claim and this Court reversed the decision of a lower court interfering with the Board's determination. In so doing this Court stated:

> The legislative history supports the view that the employees are to have the option of rejecting collective representation. The ballot that the Board proposed to use in future elections fully comports with this conception of the Act. Using the Board's ballot an employee may refrain from joining a union and refuse to bargain collectively. All he need do is not vote and this is considered a vote against representation under the Board's practice of requiring that a majority of the eligible voters in a craft or class actually vote for some representative before the election is valid. The practicalities of voting—the fact that many who favor some representation will not vote—are in favor of the employee who wants "no union." Indeed, the method proposed by the Board might well be more effective than providing a "no union" box, since, if one were added, a failure to vote would then be taken as a vote approving the choice of a majority of those voting. This is the practice of the National Labor Relations Board.

Id. at 669 n.5.

There thus exists an avenue under the statute to terminate representation not involving applications such as the Board dismissed.

Rejection of the Court of Appeals decision does not give rise to any substantial constitutional issue to be decided. Union membership in a union certified to represent Railway Labor

Act employees does not violate any First Amendment rights. *See Railway Employees Department* v. *Hansen*, 351 U.S. 225 (1956). Similarly, this Court has interpreted the Act to issue the protection of First Amendment rights of union members. *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961). The relationship between a railroad employee and the union representing him does not involve or affect any association right cognizable under the First Amendment. The District Court properly dismissed the constitutional claims of respondent.

CONCLUSION

The petitioner BRAC respectfully submits that this Court should, upon the basis of the points and authorities set forth above, grant the petition for certiorari to review the judgment of the Court of Appeals for the Fifth Circuit here involved so as to correct the violence done to the administration of the representation provisions of the Railway Labor Act by that judgment and to restore the long established principles of the exclusive jurisdiction over representation proceedings of the Mediation Board with only limited and narrow judicial review

to eliminate gross violations of specific statutory commands, also violated by that judgment.

Respectfully submitted,

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February 24, 1984

APPENDIX

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,
Petitioner,

v.

LAURENCE G. RUSSELL, WILLIAM L. HANNA AND EDDIE D. LANGWELL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 24, 1984

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

APPENDIX A

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 82-1466

LAURENCE G. RUSSELL, WILLIAM L. HANNA and EDDIE D. LANGWELL,
Plaintiffs-Appellants,

v.

NATIONAL MEDIATION BOARD, the Atchison, Topeka and Santa Fe Railway Company, *et al.*,
Defendants-Appellees.

Sept. 22, 1983

OPINION

E. GRADY JOLLY, Circuit Judge:

This case, one of first impression, involves the question of whether jurisdiction exists under the Railway Labor Act, 45 U.S.C. §§ 151-188, to review refusal by the National Mediation Board to process an employee's application to hold an election among a class of employees after the Board determined that those employees apparently desired to terminate collective representation. We find that while judicial review of Board actions is limited, jurisdiction does exist to compel compliance with the Act. We find further that the Board has here failed to fulfill its statutory duty to investigate a representational dispute so as to allow full and free expression of employee desires with regard to collective representation. Jurisdiction exists, therefore, and we reverse the lower court and remand this case for disposition consistent herewith.

I.

In June 1943 the police officers and special agents below the rank of captain on the Atchison, Topeka and Santa Fe Railroad

elected to be represented under the Railway Labor Act by the National Council of Railway Patrolmen's Union, AFL. This selection was certified by the Board in Case R-1091 (1943).

As revealed by the record, the employees in the bargaining unit over the years apparently considered the union a good representative. No attempt was made, prior to the events involved here, either to oust the union or to replace it with another union. No subsequent ratification of the union's representation has ever been made, even when the Railway Patrolmen's Union was replaced as the collective bargaining representative by its successor in interest, the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ["BRAC"].

For whatever reason. however, this era of good feelings between BRAC and the Santa Fe police officers became inclement in 1980. In the wake of similar efforts by other Santa Fe employee groups, some of the officers formed an "Association of Santa Fe Railway Police Officers." On January 4, 1981, the Association mailed a letter to members of the bargaining unit soliciting their support in the attempt to "discertify" BRAC as the collective bargaining representative. According to the letter, the Association "will have its own representation, with collective bargaining rights, to bargain for our own needs, not those of the clerks." A follow-up letter on February 22, 1981, from two of the plaintiffs and a third bargaining unit employee indicated that response to the January 14 letter had been favorable and proposed selection of "a rank and file employee," Larry Russell, as the unit's representative "for purposes of getting us placed in the 'exempt employees' category." The letter indicated that such "exemption" should "result in improved benefits and conditions. . . ." The letter included a detailed list of proposed salary terms and conditions of employment. The last "proposal" stated that "[a]ll agreements, rules, practices, interpretations, and/or understandings, however established, shall be abrogated. . . ." Also included with the letter was an authorization card designating Larry Russell as representative "for all purposes under the Railway Labor

Act." According to the plaintiff's brief, BRAC responded to the February 22 letter with two letters in opposition to the proposed rejection of BRAC as collective bargaining agent. These letters, however, are not included in the record.

In response to the second letter, 113 cards were returned "authorizing" Larry Russell to serve as "representative" for the employee unit. According to the plaintiffs, the unit comprised 210 employees and, thus, also according to the plaintiffs, a majority of the employees desired to be "exempt," i.e., desired no permanent collective bargaining representative.

Armed with the authorization cards, on March 21, 1981, Russell filed an "Application for Investigation of Representational Dispute" with the Board. The application stated that "a dispute has arisen among the employees of [Santa Fe] as to who are the representatives . . . designated and authorized in accordance with the requirements of the Railway Labor Act." Russell requested that the Board "investigate this dispute and certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act."

The Board requested responses to Russell's application from Santa Fe and BRAC. BRAC filed a Statement of Position, opposing the application on the grounds that "(1) Russell's application in effect constitutes a petition for decertification," not authorized by the Act; "(2) Russell lacks any intention to act as the 'representative' of employees, as that term is used in the Railway Labor Act;" and (3) Santa Fe had "assisted and encouraged, if not initiated and orchestrated," Russell's application.

In a significant portion of its statement, BRAC discussed three previous Board cases in which a Santa Fe employee, acting on behalf of his craft or class of employees, had sought to oust the incumbent union, abrogate the collective bargaining

agreement, and then have the Board revoke the certification, thereby leaving the employees unrepresented.[1]

The Board received the statements and evidence from BRAC and Santa Fe, as well as a statement from the plaintiffs in response to BRAC's statement. The Board also considered a documented telephone conversation between the chief hearing officer for the Board and Russell's attorney. According to the

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[1] As indicated in BRAC's Statement of Position, in Case No. R-5039, an individual, J. J. McDaniel, acting on behalf of Santa Fe's yardmasters, had been certified by the Board after a Board election as the bargaining representative on March 31, 1980, to replace the Railroad Yardmasters of America. McDaniel abrogated the collective bargaining agreement with Santa Fe. On July 1, 1980, at McDaniel's request, the Board revoked McDaniel's certification, thereby leaving the employees unrepresented.

In Case No. R-5123, Raul Herrera was elected to represent the yardmasters employed by a Santa Fe subsidiary, Los Angeles Junction Railway Co. Herrera was certified as the representative on September 22, 1980. After abrogating the collective bargaining agreement, Herrera requested revocation of his certification. That request remains pending.

In the Matter of the Application of J. D. Blankenship, 8 NMB No. 18 (Oct. 20, 1980), involved an attempt by Blankenship to be certified as the representative for the class or craft of Santa Fe's dispatchers. The authorization cards distributed by Blankenship provided that he was to undertake "whatever processes are necessary to discertify [sic] my current application with the American Train Dispatchers Association and to pursue whatever course of action is necessary to become an exempt employee of the Santa Fe. . . ." The Board dismissed the application on the grounds that the Act does not provide for "decertification" of a union.

On October 28, 1980, the Board issued a Notice of Hearing to determine whether there was any impropriety "on the part of the employee representatives and the carriers" involved in the McDaniel, Herrera and Blankenship cases. Insofar as the record reveals, that inquiry is pending.

officer's report, dated April 13, 1981, the attorney indicated that Russell intended "to do what McDaniel did with the Yardmasters . . ., namely, win, negotiate an 'exempt' status and walk away from his status as a representative." Among other things, the hearing officer told Russell's attorney that "the Board could dismiss an application any time it found a lack of intent to represent employees."

The other items of information considered by the Board in its investigation were three letters, verbatim copies each of the others, dated April 17, 1981, from Russell to his congressman, Representative Hightower, and to his two senators, Senator Tower and Senator Bentsen. These letters, consistent with the representation made by Russell's attorney to the Board's chief hearing officer, complained that the Board's officer had indicated that Russell could not be elected despite the employees' desire to elect him.

Consideration of these items was the extent of the Board's investigation. On May 21, 1981, the Board issued an order dismissing Russell's application. In pertinent part, that order stated:

> The Board finds that Laurence G. Russell lacks an intent to represent the subject craft or class if elected and certified, as evidenced by his announced and undisputed plan to abrogate all existing collective bargaining agreements, thereby leaving the employees unrepresented *in effect*, notwithstanding the certification and the obligations which attach thereto.

The order declared that, absent intent to represent, certification was not appropriate under the Act:

> The Railway Labor Act, unlike the National Labor Relations Act, contains no statutory provision for decertification of a bargaining representative. [ATSF], 8 NMB No. 18 (1980) [the Blankenship case]. *See also, Manufacturers Railway Company*, 7 NMB Nos. 233 and 250 (1980). The Board will not progress an application for investigation of a representation dispute where the applicant lacks the intent to represent the craft or class, if certified. *Chicago Union Station*, 8 NMB No. 45 (1980),

and will dismiss such an application because it is void *ab initio*. *Id.*

II.

Russell *et al.* filed this suit in July 1981 alleging two causes of action. The plaintiffs sought a declaratory judgment under 28 U.S.C. § 2201 and 2202 that the Board's actions were unlawful, arbitrary and capricious, an abuse of discretion, in excess of statutory authority and violative of the plaintiffs' first amendment right to freedom of association. Also, a writ of mandamus was sought to compel the Board to hold a representational election.

The second cause of action sought an injunction directed to BRAC and Santa Fe to invalidate the union security agreement, at least until a representational election were held, requiring membership in BRAC as a condition of employment with Santa Fe.

The Board filed a Motion for Summary Judgment urging that the district court lacked jurisdiction to review its action. The district court granted that motion, holding that "[i]t is well established that [the Board's] decisions regarding representational disputes, made pursuant to Section 2, Ninth, of the Railway Labor Act, are not subject to judicial review." The lower court found "two limited exceptions" to this judicial bar: where the Board's action violates a party's constitutional rights and where it acts " 'in excess of its powers or contrary to a statutory mandate.' " (Citations omitted.) The court found that neither exception was present, holding that the Board's investigation was "sufficient and within its scope of authority," and that the investigation met the constitutional due process requirements.

The plaintiffs filed a timely appeal, challenging only the grant of the Board's motion for summary judgment.[2]

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[2] Subsequent to granting the Board's summary judgment motion, the lower court granted BRAC's unopposed motion for summary judgment and Santa Fe's unopposed motion to dismiss.

III.

The Board's refusal to "progress" Russell's Application for Investigation of Representational Dispute was based on the Board's determination that Russell was seeking a back door method of decertification, for which the Act does not provide. Collective representation is necessary, the Board argues, to assure the avoidance of strikes and transportation stoppages. Such avoidance is the "heart" of the Act. If the employees are not collectively represented, according to the Board, their only resort in the event of a dispute with management is to strike. The Board argues, therefore, that its policy in this case of precluding nonrepresentation of these employees falls squarely within its statutory mandate and is therefore outside our jurisdiction. As to the plaintiffs' constitutional argument, the Board simply argues that the provisions of the Act have been held constitutional, that the Board is acting consistently with those provisions, and therefore no constitutional rights have been violated.

The plaintiffs argue that the Board's policy violates the employees' statutory right to choose whether or not they wish to be collectively represented.[3] They point out that none of the current members of the craft was a member in 1943 when unionization was initially chosen. According to the plaintiffs, the language of the Act, its legislative history and judicial precedent all provide employees a right to have or not to have

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[3] The plaintiffs point out that the Board has, prior to 1980, allowed employees to opt-out of collective representation by the "straw man" procedure sought to be used here. The plaintiffs cite eight Board cases in which this method was successful, including the J. J. McDaniel case, Case R-5039 (1980), discussed *supra* at note 1. The Board argues that it has never authorized "straw man" un certification, but rather considered that the persons seeking certification in those cases intended to remain as bona fide bargaining representatives. The plaintiffs point out that the "straw man" procedure is well known among Board pundits, citing GOHMANN, ARBITRATION AND

collective representation. The plaintiffs argue that the Board's refusal to allow them their right to choose whether or not they are to be collectively represented violates the Board's statutory mandate. Also, the plaintiffs argue that the Board's policy violates their first amendment right to freedom to associate or not to associate.

IV.

Three principal issues are presented for our consideration: whether jurisdiction exists for review of the Board's action in a representational dispute; whether the Act requires a representational election even when that election might result in the selection of nonrepresentation; and whether the Board here, by refusing to "progress" Russell's application, violated its statutory mandate.

V.

We must first determine the extent, if any, to which this court may review the Board's actions here.

The starting point in considering the proper scope of this court's jurisdiction is the Railway Labor Act trilogy of *Switchmen's Union* v *NMB*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943); *General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Missouri-K.T.R.R.*, 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76 (1943); and *General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Southern*

REPRESENTATION: APPLICATIONS IN AIR AND RAIL LABOR RELATIONS 29 (1981) (outlining "awkward" method of decertification by individual employee standing for election).

Regardless of whether true precedent exists, however, the Board has clear authority to change its own procedures, so long as such changes comply with the requirements of the Act. *Brotherhood of Locomotive Firemen and Enginemen* v. *Kenan*, 87 F.2d 651, 654 (5th Cir.), *cert. denied*, 301 U.S. 687, 57 S.Ct. 790, 81 L.Ed. 1344 (1937).

Pacific Co., 320 U.S. 338, 64 S.Ct. 142, 88 L.Ed. 85 (1943). In *Switchmen's Union* the union opposed the Board's determination as to which yardmen should vote in a representation election. The union brought suit to have the certification of the collective bargaining representative set aside. The district court upheld the Board's decision and was upheld by the court of appeals. The Supreme Court held that the district court did not have jurisdiction to review the Board's action.

Reviewing the legislative history of the Railway Labor Act, the Court held that Congress clearly intended that the Board would be the final arbiter of representational disputes. Noting the background of arbitration and mediation which existed for resolution of railway labor problems, the Court in *Switchmen's* found "highly relevant" the legislative history of section 2, Ninth, of the Act.[4] 320 U.S. at 302, 64 S.Ct. at 98.

The Court found that the legislative history of the Act and the specific language of section 2, Ninth, demonstrated con-

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[4] 45 U.S.C. § 152, Ninth, reads as follows:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein

vincingly that the Board was to be " 'a neutral tribunal which can make the decision [as to the proper representative of an employee group] and get the matter settled.' " *Id.* at 303, 64 S.Ct. at 98 (quoting Commissioner Joseph B. Eastman, Federal Coordinator of Transportation and principal draftsman of the 1934 amendments to the Act). The Court noted that the provision whereby the Board could appoint a three-person committee to designate which employees should participate in a representation election was included "so that the Board's 'own usefulness of settling disputes that might arise thereafter might not be impaired.' S.Rep. No. 1065, 73d Cong., 2d Sess., p. 3." *Id.*

> Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but believe that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

Id. The Court went on to find that, having no subpoena or enforcement power, the Board's function "under § 2, Ninth, is more the function of a referee." *Id.* at 304, 64 S.Ct. at 98.

> In the present case the authority of the Board in election disputes to interpret the meaning of "craft" as used in the statute is . . . clear and . . . essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is . . . explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the facts and then

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indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

> cease. . . . [T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

Id. at 305, 64 S.Ct. at 99.[5]

Consistent with *Switchmen's Union*, the courts have universally agreed that the details and procedures of representational disputes are committed solely to the Board's discretion. *British Airways Bd.* v. *NMB*, 685 F.2d 52, 56 (2d Cir. 1982); *Brotherhood of Locomotive Firemen & Enginemen* v. *Seaboard Coast Line R.R.*, 413 F.2d 19 (5th Cir.), *cert. denied*, 396 U.S. 963, 90 S.Ct. 432, 24 L.Ed.2d 426 (1969); *Teamsters* v. *BRAC*, 402 F.2d 196, 205 (D.C. Cir.), *cert. denied*, 393 U.S. 848, 89 S.Ct. 135, 21 L.Ed.2d 119 (1968). Courts are not to substitute their judgment for the Board's or "otherwise interfere with its legal function," *Aircraft Mechanics Fraternal Assn.* v. *United Airlines*, 406 F.Supp. 492, 500 (N.D.Cal. 1976), and only the Board can certify or "decertify" a union. *Texidor* v. *Ceresa*, 590 F.2d 357, 359 (1st Cir. 1978). So it is that judicial review of the Board has correctly been analyzed as "sparing." *Sedalia-Marshall-Booneville* v. *NMB*, 574 F.2d 394, 397 (8th Cir. 1978). "Sparing," of course, is not an absolute.

To return for a moment to *Switchmen's Union*, we note that despite the Court's certainty that the Board determinations under section 2, Ninth, were not judicially reviewable, the Court did hint at one notable exception to an almost absolute

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[5] Perhaps the most persuasive evidence of lack of judicial review over section 2, Ninth, determinations by the Board noted in *Switchmen's Union* is the provision for judicial review in section 3, First, of the Act (suits based on awards by the National Railroad Adjustment Board) and in section 9, Third, of the Act (suits based on awards by a board of arbitration). "When Congress in § 3 and in § 9 provided for judicial review . . . and in § 2 of the same Act omitted any such provision . . . it drew a plain line of distinction." 320 U.S. at 306, 64 S.Ct. at 99.

judicial bar when it stated, "*[a]ll constitutional questions aside*, it is for Congress to determine how the rights which it creates shall be enforced." *Id.* 320 U.S. at 301, 64 S.Ct. at 97. As discussed below, this door left ajar has subsequently been pushed open.

Another opening to the preclusion of judicial review of section 2, Ninth, decisions by the Board was provided in *Switchmen's Union's* companion case, *General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Missouri-K.T.R.R.* Similar to *Switchmen's Union*, the dispute in this case involved which of two unions was appropriate to represent a craft of employees in grievance proceedings. The Court again upheld the determination made by the Board, stating that Congress had "fashioned an administrative remedy and left that group of disputes [between unions or between groups of employees] to the Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive." 320 U.S. at 336, 64 S.Ct. at 152. In the footnote to that last passage, however, the Court stated significantly, "[w]hether judicial power may ever be exerted to require the Mediation Board to exercise the 'duty' imposed upon it under § 2, Ninth, and, if so, the type or types of situations in which it may be invoked present questions not involved here." *Id.* at 336 n. 12, 64 S.Ct. at 152.

These two apertures for a judicial "peek at the merits"[6] have been consistently used in the wake of the *Switchmen's Union* trilogy.[7]

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[6] *Teamsters* v. *BRAC*, 402 F.2d at 205.

[7] In Jaffe, *The Right to Judicial Review*, 71 HARV.L.REV. 401, 430 (1958), *Switchmen's Union's* temerity is ascribed to "the mood of judicial self-deprecation and abdication into which the Court of that period had fallen." The article goes on to state that "*Switchmen's Union* has borne little fruit." *But see* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE 42 (1958), which characterizes *Switchmen's Union* as "[m]uch the most important case holding that a statute inexplicitly precluded judicial review."

The key case on point in this circuit is *United States* v. *Feaster*, 410 F.2d 1354 (5th Cir.), *cert. denied*, 396 U.S. 962, 90 S.Ct. 427, 24 L.Ed.2d 426 (1969). At issue in *Feaster* was whether the Board erred in making a unit determination. After a thorough analysis of the Act and *Switchmen's Union*, *Feaster* enumerated the limited instances in which judicial review of section 2, Ninth, disputes are allowed. First, judicial interdiction will be permitted where a complaining party makes a "substantial showing" of a violation of that party's constitutional rights as a result of the Board's action. 410 F.2d at 1366, quoting *Boire* v. *Miami Herald Publishing Co.*, 343 F.2d 17, 21 (5th Cir.), *cert. denied*, 382 U.S. 824, 86 S.Ct. 56, 15 L.Ed.2d 70 (1965). Second, courts may intervene with Board actions which are " 'in excess of its delegated powers and contrary to a specific prohibition in the Act.' " 410 F.2d at 1367, quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188, 79 S.Ct. 180, 184, 3 L.Ed.2d 210 (1958). *Leedom* involved certification by the National Labor Relations Board of a unit of both professional and nonprofessional employees in contravention of the express provision of 29 U.S.C. § 159(b)(1).[8] In holding that the district court had jurisdiction, the Court in *Leedom* stated:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. . . . [The Board's action] was an attempted exercise of power that had been specifically withheld. It deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

358 U.S. at 188-89, 79 S.Ct. at 184.

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[8] Despite the fact that *Leedom* involved a dispute under the National Labor Relations Act, *Feaster* characterized it as "the only undisputed exception to *Switchmen's* doctrine that Mediation Board decisions in representation matters are unreviewable." 410 F.2d at 1366 n. 11.

After analyzing this language, *Leedom's* analysis of *Switchmen's Union*, and *Leedom's* progeny, *Feaster* summed up the *Leedom* exception as follows:

> Under this exception access to the courts is accorded only if the Mediation Board's determination is infused with error which is of a *summa* or *magna* quality as contraposed to decisions which are simply *cum* error. Only the egregious error melds the Board's decision into justiciability. Lesser malignancies thwart the jurisdiction of the courts.

410 F.2d at 1368. Using this "narrow and rarely successfully invoked" standard, *id.*, *Feaster* went on to determine that the Board had not so clearly and egregiously violated a specific prohibition of the Act, by determining that the facility involved was a "carrier" within the meaning of the Act, as to vest jurisdiction.[9]

Numerous court decisions have elaborated on judicial interdiction in Railway Labor Act cases. *See BRAC* v. *Association for Benefit of Non-Contract Employees*, 380 U.S. 650, 661, 85 S.Ct. 1192, 1998, 14 L.Ed.2d 133 (1965) (judicial review allowed where the Board acts in excess of statutory authority or where review necessary to compel performance by the Board of statutorily mandated duties); *British Airways*, 685 F.2d at 56 (judicial review allowed where the Board contravenes statutory policy); *Teamsters* v. *BRAC*, 402 F.2d at 205 (jurisdiction present where the Board's action is " 'so plainly beyond the bounds of the Act, or . . . so clearly in defiance of it, as to warrant the immediate intervention of an equity court,' " quoting *Local 130, International Union of Electric, Radio & Machine Workers* v. *McCulloch*, 345 F.2d 90, 95 (D.C.Cir. 1965)); *Air Canada* v. *NMB*, 478 F.Supp. 615, 616

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[9] *Feaster* briefly discussed a third exception to *Switchmen's Union's* bar, that is, where the issue involves a question of "international urgency." 410 F.2d at 1365. Our review of the applicable case law indicates that this exception has received scant attention. It clearly does not weigh on the instant controversy.

(S.D.N.Y. 1980), *aff'd.*, 107 L.R.R.M. 2049 (2d Cir.), *cert. denied*, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 381 (1981) (determination by the Board in representation dispute final unless in gross violation of statutory policy); *Railway Employees Co-operative Ass'n.* v. *Atlanta B & C. R.R.*, 22 F.Supp. 510, 514 (D.Ga. 1938) (court without jurisdiction to review decision "unless it should become absolutely necessary to protect complainants' rights. . . .").

As a rule, we are not to look over the Board's shoulder in representational disputes. These matters are, apart from exceptional cases, solely the Board's concern. As discussed in *Switchmen's Union*, Congress intended that the Board have the final word in such matters. But where Congress has created a right, the Board cannot destroy that right without intervention by the judiciary. To hold otherwise would rob the Act of its vitality and thwart its purpose. 320 U.S. at 300, 64 S.Ct. at 97.

VI.

In this case, the plaintiffs argue that the Board has violated its own statutory mandate to allow employees their right to full and free expression of their choice regarding collective representation, including the right to reject collective representation. They argue further that the Board's action violates their constitutional right to freedom of association, including the right not to associate. Because we find that the Board has violated its statutory mandate, we need not address the constitutional issue.[10]

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[10] When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. *Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1931), quoted in *International Association of Machinists* v. *Street*, 367 U.S. 740, 749, 81 S.Ct. 1784, 1790, 6 L.Ed.2d 1141 (1961).

VII.

We believe that the Board breached its clear statutory mandate by not "progressing" Russell's application for investigation into the representational dispute. The process for such "progress" is set forth in 29 C.F.R. § 1206.2(a):

> [W]here the employees involved in a representation dispute are represented by an individual or labor organization . . . and are covered by a valid existing contract between such representative and the carrier a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the Board will authorize an election or otherwise determine the representation desires of the employees under the provision of section 2, Ninth, of the Railway Labor Act.

The Board refused to move forward with Russell's application for essentially two reasons. First, the Board determined that Russell did not intend to "represent" the unit employees within the meaning of the Act. Second, to allow the sought election, certification of Russell as the elected collective representative, abrogation of the contract and achievement of non-represented status for the craft or class would, according to the Board, violate its statutory duty to achieve the basic purpose of the Act. That purpose, the Board argues, is the avoidance of work stoppages resulting from labor/management disputes. And, in order to avoid those stoppages, collective representation is necessary.

In its first argument the Board defines "intent to represent" as the intent to represent in contract negotiations, contract disputes, grievance procedures, and in all other matters where a labor-management go-between might be effective. Because Russell did not "intend to represent" for all of those purposes and in fact intended ultimately not to represent the employees at all, the Board found that he could not have been a representative and, thus, there existed no "representational dispute."

No doubt, the above-listed functions are the usual, ordinary and anticipated functions of a "representative" under the Act.

That Russell did not "intend to represent" his fellow employees in the accustomed fashion, however, does not mean that he did not "intend to represent" them within the meaning of the Act. Section 1, Sixth, defines "representative" as "any person or persons, labor union, organization, or corporation designated either by a carrier . . . or by its . . . employees, to act for it or them." There are no qualifiers attached to the Act's simple definition of "representative." The "representative" of a craft of employees is, simply, a person or union designated to act on their behalf, to accomplish what they seek to accomplish, and is not necessarily a man for all seasons. As discussed at length below, the Act nowhere *requires* collective representation. To accept the Board's definition of "intent to represent" would be to impose such a requirement. A claimed majority of the craft here wanted Russell, apparently, to terminate collective bargaining. Torturous interpretations of "representation" aside, Russell fits the bill.[11]

At oral argument the Board's attorney, in arguing that the Board determined correctly that no representational dispute existed because Russell did not intend to "represent" the craft employees, suggested that the appropriate course of action here would have been for the employees to have petitioned the Board "to hold an election to either vote for the current union representative, BRAC, or, no union." This, of course, is exactly what Russell was requesting, and the Board very well knows it now and knew it at the time Russell applied. In our view, this suggestion is nothing more than playing games with the plaintiffs and with this court.[12] We do not see why the suggested course of action is any more or less objectionable

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[11] The Board would say that the employees are "represented" by someone who does not represent their wishes, and are not "represented" by someone who does represent their wishes. Orwell would understand this perfectly.

[12] Equally disturbing is the Board's response, when asked why Russell had not been informed of the "preferred" method of petitioning, that they had never been asked. Mr. Orwell, meet Mr. Kafka.

than the action taken by Russell. In fact, the Board's suggested procedure is almost identical to the decertification vote under the National Labor Relations Act, which the Board has stated time and time again is not allowed by the Act.

The second, more substantive argument forwarded by the Board requires more attention. The Board correctly notes that the basic purpose of the Railway Labor Act is

> to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152, First. This has been called the "heart" of the Act. *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377-78, 89 S.Ct. 1109, 1114-15, 22 L.Ed.2d 344 (1969). *See also California* v. *Taylor*, 353 U.S. 553, 565-66, 77 S.Ct. 1037, 1044, 1 L.Ed.2d 1034 (1957) (purpose of Act is to provide for industry-wide government to avoid interruption of national transportation system); *Slocum* v. *Delaware, L & W R.R.*, 339 U.S. 239, 242-43, 70 S.Ct. 577, 579, 94 L.Ed. 795 (1950) (Act represents a "considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes"); *Pan Am World Airways* v. *Carpenters and Joiners*, 324 F.2d 217, 220 (9th Cir. 1963), *cert. denied*, 376 U.S. 964, 84 S.Ct. 1123, 11 L.Ed.2d 982 (1964) (purpose of Act is to keep transportation moving); *Estes, et al.* v. *Union Terminal Co.*, 89 F.2d 768, 770 (5th Cir. 1937) (purpose of Act is "to facilitate peaceful, orderly adjustment of disputes between railroads and their employees, to prevent strikes and other disturbances.").

It cannot be gainsaid that the Act does in fact encourage collective bargaining as the mode by which disputes are to be settled and work stoppages avoided. *Detroit & Toledo S.L.R.R.* v. *United Transportation Union*, 396 U.S. 142, 148, 90 S.Ct. 294, 298, 24 L.Ed.2d 325 (1969). Under the Act, Congress gave unions "a clearly defined and delineated role to

play in effectuating the basic congressional policy of stabilizing labor relations in the industry." *International Association of Machinists* v. *Street*, 367 U.S. 740, 760, 81 S.Ct. 1784, 1795, 6 L.Ed.2d 1141 (1961). When the Act was initially passed in 1926, company-dominated unions were the rule, and, in its early years, the Act was not deemed effective. Thus, in 1934, the Act was amended, with a primary purpose being the strengthening of labor organizations vis-a-vis the carriers.[13] As stated in *Aircraft Mechanics Fraternal Ass'n.*, 406 F.Supp. at 497, the Board was created because, under the United States Board of Arbitration "[c]ompany unionism . . . continued to present a problem. A means was required by which the will of the employees, uninfluenced by the employer, could be ascertained." This is consistent with the second "general purpose" of the Act found at 45 U.S.C. § 151a, namely, "to forbid any limitation upon freedom of association among employees or any denial of the right of employees to join a labor organization"; it is consistent as well with the third general purpose stated in section 151a, to provide "complete independence . . . of employees in the matter of self-organization. . . ." Similarly, section 2, Third, provides for designation of representatives "without interference, influence, or coercion" and section 2, Fourth, provides that "[e]mployees shall have the right to organize and bargain collectively through representatives of

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[13] H.R.Rep. No. 1944 to accompany H.R.Rep. No. 9861, Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 3 (1934) (1934 amendments "in the interest of industrial peace and of uninterrupted transportation service."). The 1934 amendments created the Board out of the old United States Board of Mediation, which, in 1926, at the passage of the Act, had in turn replaced the Railroad Labor Board created by the Transportation Act of 1920. 41 Stat. 456 (1920). The Board was given significantly increased powers, especially in representation disputes. For an overview of the history of the Act, *see Ruby* v. *American Airlines*, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913, 84 S.Ct. 658 (1964); and *Aircraft Mechanics Fraternal Ass'n.* v. *United Airlines*, 406 F.Supp. 492, 497 (N.D.Cal. 1976).

their own choosing. The majority of any craft or class shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." The Board is therefore correct when it argues that the Act supports collective bargaining and when it argues that one of the Board's purposes is to support collective bargaining.

This in no way, however, takes away from the fact that employees were given the right under the Act not only to opt for collective bargaining, but to reject it as well. The language of the Act, quoted above, clearly stands for this proposition. The employees "shall have the *right*"—not the *duty*—to select a collective bargaining representative. They shall have "complete independence" to organize . . . or not organize. And while the "heart" of the Act directs that "every reasonable effort" be made "to make and maintain" collective bargaining agreements, it is only every *reasonable* effort which is required. The Act supports but does not require collective bargaining, and in our view, the implicit message throughout the Act is that the "complete independence" of the employees necessarily includes the right to reject collective representation.[14] Indeed, the concept of "complete independence" is inconsistent with forced representation, most especially when that forced representation is at odds with employees' will and desires.

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[14] The statement in *Virginian Ry.* v. *System Federation*, 300 U.S. 515, 548, 57 S.Ct. 592, 599, 81 L.Ed. 789 (1937) (emphasis added) that the aim of the Act is to "secur[e] settlement of labor disputes by *inducing* collective bargaining with the *true representative* of the employees and by preventing such bargaining with any who do not represent them," is consistent without holding here. The Act *induces*, it does not force, and that inducement applies only to the *true* representative. Likewise, in *Order of Railroad Telegraphers* v. *Chicago & Northwestern Ry.*, 362 U.S. 330, 337, 80 S.Ct. 761, 765, 4 L.Ed.2d 774 (1960) (emphasis added), the Court stated that "[t]he Railway Labor Act safeguards an *opportunity* for employees to obtain a contract through collective rather than individualistic

The legislative history of the Act expressly supports this view. In the official House committee report on the proposed amendments, the analysis of section 2 states that "the employees shall be free to join any labor union of their choice and likewise to be free to refrain from joining any union if that be their desire. . . ." H.R. Rep. No. 1944 to accompany H.R. 9861, Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 2 (1934). In hearings on H.R. 7650, House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 57 (1934), Commissioner Eastman stated that the legislation "does not require collective bargaining on the part of the employees. If the employees do not wish to organize, prefer to deal individually with the management with regard to these matters, why, that course, is left open to them, or it should be." Commissioner Eastman also testified before the Senate that "genuine freedom of choice [is] . . . the basis of labor relations under the Railway Labor Act. . . ." Hearings on S. 3266, Senate Committee on Interstate Commerce, 73d Cong., 2d Sess. 157 (1934). Senator Wagner, later to be the chief architect of the National Labor Relations Act of 1935, stated in hearings on S. 3266 before the Senate, 73d Cong., 2d Sess. 76 (1934), that his understanding of the Act was not that it compelled an employee to join any particular union, but that its purpose "was just the opposite, to see that men have absolute liberty to join or not to join any union or to remain unorganized." And during the relatively brief debate in the House on H.R. 9861, Congressman Crosser, the primary sponsor and floor leader of the bill, stated that "[m]en may organize as they see fit. . . . [The Act] gives employees the absolute freedom to establish unions of employees of a company *if they so desire*. . . ." 78 CONG.REC. 11,713-14 (1934) (emphasis added).

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bargaining." *See also International Association of Machinists* v. *Northwest Airlines*, 673 F.2d 700, 707 (3rd Cir. 1981) (to further goal of ensuring that designation of bargaining representation be free from employer coercion, the Board was "empowered to resolve representational disputes by investigation and certification of the representative that reflected the unfettered choice of the employees.").

The courts which have examined the issue of employees' rights to reject collective representation are in unanimous agreement that the Act provides such a right. The principal case on point is *BRAC* v. *Association for Benefit of Non-Contract Employees*, 380 U.S. 650, 85 S.Ct. 1192, 14 L.Ed.2d 133 (1965). In that case, involving two unions competing to represent a craft of employees, the Court considered the narrow question of whether the Board's ballot conflicted with the employees' right to vote against representation by either union. The Court had no trouble in determining that the "legislative history supports the view that the employees are to have the option of rejecting collective representation," 380 U.S. at 669 n. 5, 85 S.Ct. at 1202. Although the Court upheld the ballot form, it had no doubt about the right of employees, although then represented, to opt-out from under representation altogether. In dissent, Justice Stewart objected to the ballot form, which did not contain a "no union" box.[15]

> This ballot form is directly attributable to the Board's view of what the bargaining pattern should be in the airline industry. The Board has stated that "the Act does not contemplate that its purposes shall be achieved, nor is it clear that they can be achieved, without employee representation. . . ." . . . I believe both the language of the Act and its legislative history belie this view and, for that reason, I would order the Board to reconsider the form of its ballot.

380 U.S. at 673, 85 S.Ct. at 1204. Justice Stewart goes on to state that the Act

> furnish[es] the opportunity for majority determination within each employee group of what the nature of bargaining shall be. But the Act is not compulsory. Employees are not required to organize, nor are they required to select labor unions or anyone else as their representatives. It has

[15] To indicate opposition to representation by any union, an employee has to withhold casting his or her ballot.

> always been recognized that under the law the employees have the option of rejecting collective representation.

Id. at 674, 85 S.Ct. at 1205. In closing, Justice Stewart noted that the Board had "hewn to its mistaken belief that its duty is to encourage collective representation in the airline industry." *Id.* at 677, 85 S.Ct. at 1206.

In *Teamsters* v. *BRAC*, 402 F.2d 196 (D.C.Cir.), *cert. denied*, 393 U.S. 848, 89 S.Ct. 135, 21 L.Ed.2d 119 (1968), BRAC was the certified bargaining representative for Pan American clerks and office employees. BRAC sought to enjoin the Board from holding an election which would have determined whether the employees desired to be represented by BRAC or by the Teamsters. Two invalid elections were held and a third election scheduled, which BRAC opposed, arguing that "the Board has no power whatever to decertify a union; all it may do is certify some new representative." Because BRAC was to appear on the ballot, and because it was possible that fewer than half of the eligible voters might vote, it was possible that there might be a vote in favor of neither union, thereby rejecting collective representation. BRAC sought to enjoin the ballot, arguing, as the Board argues here, that no procedure for decertification was contained in the Act; therefore, BRAC argued, the ballot was by definition improper. The court cited *BRAC* v. *Association for Benefit of Non-Contract Employees* as support for the employees' right to reject any collective representation.

> It is true . . . that that case involved an attempt to unionize employees not then collectively represented, rather than, as here, an attempt by one union to dislodge another. *We agree with counsel for the Board, however, that it is inconceivable that the right to reject collective representation vanishes entirely if the employees of a unit once choose collective representation.* On its face that is a most unlikely rule, especially taking into account the inevitability of substantial turnover of personnel within the unit.
>
> The right of employees to reject collective representation, recognized in *Railway Clerks* v. *Association [for*

> *Benefit of Non-Contract Employees]*, yields as a corollary the Board's implied power to certify to the carrier that in a particular unit the employees have in fact rejected such representation. . . . The Board has in the past refused to certify a representative, when an election among unorganized employees failed to elicit the votes of 50% of the employees, without any hue and cry that employees must be represented so that the negotiation contemplated by the Act may go on. The Board may not only decline to certify a representative, but may go further and certify that there is no representative.

402 F.2d at 202-03 (emphasis added).

In *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886 (1945), *modified upon rehearing*, 327 U.S. 661, 66 S.Ct. 721, 90 L.Ed. 928 (1946), the employees asserted a back-pay claim under the collective bargaining agreement. The union grievance committee handled the claim and settled with the employer. The employees were not satisfied with the settlement and pursued the matter. The Railroad Adjustment Board approved the settlement as conclusive on the grounds that the union, as the bargaining agent for the employees, had absolute control over such matters. The employees brought suit in federal court under 45 U.S.C. § 153, First (m), which allows suits from Railway Adjustment Board determinations involving money awards.

The Supreme Court held, *inter alia*, that because the employees had been denied any participation in the settlement and in the action before the Board, their rights under the Act individually to express their grievances had been denied.

> It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency. . . . Acceptance of such a view would require the clearest expression of purpose. *For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment* . . . except as the collective agent might permit. Apart from the question of validity, the conclusion that Congress intended such consequences

> could be accepted only if it were clear that no other construction would achieve the statutory aims.

325 U.S. at 733-34, 65 S. Ct. at 1295 (emphasis added).[16]

Burley has been cited as "teach[ing] that individual rights of employees . . . cannot be nullified unless Congress clearly intended such consequences." *McElroy* v. *Terminal Railroad Ass'n.*, 392 F.2d 966, 969 (7th Cir. 1968). We do not believe that Congress by the passage of the Act intended to take away existing rights of employees, e.g., the right not to be represented, but rather that it intended to grant additional rights. No intention to deprive employees of existing rights is contained in or can even be inferred from the Act. To the contrary, the obvious intent of the Act, as indicated by the language of the statute itself and the underlying legislative history, is that the goals of collective bargaining and employee freedom of choice are consonant and concurrent. The latter goal clearly is *not* subsumed by the former.[17]

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[16] It should be noted that in reasoning thus, the Court stated that "[i]n this connection" it was significant that the Act did not provide for closed shops and that, accordingly, workers in minority unions and unorganized workers were implicated in the issue. The Act was amended in 1951 (64 Stat. 1238) to allow such closed shops, under 45 U.S.C. § 152, Eleventh. So some question exists about whether the result, if reached by the Court today, would be the same. *See Burley*, 327 U.S. at 667, 66 S.Ct. at 724 (Frankfurter, J., dissenting from modified opinion). We do not think, however, that this in any way diminishes the applicability of the quoted language to the decision here.

[17] The history of union security in the railway industry is marked *first*, by a strong and longstanding tradition of voluntary unionism on the part of the standard rail unions, *second*, by the declarations in 1934 of a congressional policy of complete freedom of choice of employers to join or not to join a union.

International Association of Machinists v. *Street*, 367 U.S. at 750, 81 S.Ct. at 1790.

VIII.

Having determined that the plaintiffs and their fellow employees have the clear right under the Act to opt for nonrepresentation, we turn to the key question in this case of whether the Board violated a clear statutory duty in refusing to go forward with Russell's particular application. It is undisputed that once the Board had determined that Russell intended to terminate collective representation in favor of "exempt" status, the Board refused further to investigate his application and the subject representational dispute.

This court has the power to order the Board to investigate, to investigate fully and completely and properly, and to certify the representative chosen by the craft of employees. *Flight Engineers International Ass'n* v. *Eastern Airlines, Inc.*, 359 F.2d 303, 308 (2d Cir. 1966). As noted earlier, the question of whether judicial review could be exercised to command the Board to "do what Congress commanded, namely, to investigate and certify," had been reserved in *General Comm.* v. *Missouri-K.T. R.R.*, 320 U.S. at 336 n. 12, 64 S.Ct. at 152.

Eliminating any reservation that existed, the Court in *BRAC* v. *Association for Benefit of Non-Contract Employees*, stated that in reviewing the Board's actions in a section 2, Ninth, representation dispute, a court's review extends only to determine whether the Board did in fact conduct the investigation. 380 U.S. at 661, 85 S.Ct. at 1198. The Act does not prescribe any set forms for such investigation and leaves that largely to the Board's discretion. *Id.* at 662, 85 S.Ct. at 1198. The Court did note, however, that despite that "broad and sweeping" command, "the Board's duty to investigate is a duty to make such investigation *as the nature of the case requires.*" *Id.* (Emphasis added.)

In *International In-Flight Catering Co.* v. *NMB*, 55 F.2d 712 (9th Cir. 1977), the Board had determined in 1974 that, based on authorization cards indicating a desire that the Teamsters be certified as the bargaining representative, a representational dispute existed. An election was held. The Teamsters

lost the election and the Board certified that there was no bargaining representative for IICC's employees. In 1975, after authorization cards *requesting an election* had again been signed, the Board determined that a representational dispute again existed. This time, however, the Board, without holding any election, certified the union as the collective bargaining representative.[18] IICC filed suit seeking a declaratory judgment, and the district court enjoined enforcement of the Board's certification.

On appeal, the Board contended that under the Act its actions regarding a representational dispute were not judicially reviewable, relying, as here, on *Switchmen's Union*. The Board stated that it had fulfilled its statutory duty to investigate in that it had compared the signatures on the authorization cards with those on IICC's payroll. The Board argued that the scope and form of its investigation, and its decision based thereon, were within its statutory discretion and as such were beyond the court's jurisdiction. The court disagreed.

> This position advanced by the NMB disregards the import of § 2, Ninth, of the RLA, and *Railway Clerks* v. *Non-Contract employees*. Both state that the NMB has a duty to investigate *the dispute*. The dispute, in this case, advanced by the IICC was that the cards signed by the employees only called for an election and were not votes for representation without an election. The actual investigation undertaken by the NMB in merely comparing the signatures assumes the disputed point, that the cards represented votes. . . .
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> . . . .
>
> It is a perversion of the search for truth and the policy of the RLA for the NMB to continue to insist, in these

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[18] Upon IICC's ignoring the Board's certification, the Board authorized the union to commence unilateral action against IICC, including strikes and picketing, thereby running directly counter to what it so persistently espouses as its sole duty under the Act, the prevention of work stoppages.

circumstances, that it conducted an investigation and discharged its duty under the RLA.

555 F.2d at 718-19.

Judge Friendly in *Ruby* v. *American Airlines*, 323 F.2d at 255, stated succinctly that "[t]he Board's duty to investigate is a duty to make such investigation as the nature of the case demands." As indicated previously, the nature of the instant case is that the plaintiffs and their fellow employees dispute the incumbent union's representative status and have an apparent desire not to bargain collectively. When the Board's investigation reached the point of determining the intent of the employees, the Board refused further "to progress" Russell's application, refused further to investigate the legitimate dispute among the employees as to whether the union was their representative, and thereby denied the employees their rights under the Act. When the Board balked, it crossed over from being a disinterested "referee" to being a participant. To repeat, "[u]nder this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the facts and then cease. . . ." *Switchmen's Union*, 320 U.S. at 305, 64 S.Ct. at 99. The Board failed here to find the fact in dispute: who is the true representative of the employees? It is, therefore, a "perversion of truth" for the Board to insist that it conducted the investigation and discharged its duty under the Act.

IX.

This case is therefore reversed and remanded to the district court. The court shall remand this case to the Board and direct it to proceed with its investigation into the application filed by Russell as it would any other application for investigation of a representational dispute, and not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1466

LAURENCE G. RUSSELL, WILLIAM L. HANNA
and EDDIE D. LANGWELL,
Plaintiffs-Appellants,

v.

NATIONAL MEDIATION BOARD,
Defendant-Appellee

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,

and

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES,
Defendants Below and Parties in Interest.

Appeal From The United States District Court
For The Northern District Of Texas Amarillo Division

RECORD EXCERPTS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO. CA-2-81-138

LAURENCE G. RUSSELL, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Defendants.

PARTIAL SUMMARY JUDGMENT

On this day came on for consideration the Motion for Summary Judgment filed by the Defendant National Mediation Board. After considering the motion, the briefs filed in support thereof and in opposition thereto, the Court has entered an order granting the motion.

It is ORDERED that the above cause is DISMISSED on the merits as to Defendant National Mediation Board only.

ENTERED this 17th day of March, 1982.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO. CA-2-81-138

LAURENCE G. RUSSELL, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Defendants.

ORDER

The Court has received and considered the Motion for Summary Judgment filed by the Defendant National Mediation Board and the briefs filed in support thereof and in opposition thereto.

The Plaintiffs brought this action to challenge a decision made by the National Mediation Board regarding an alleged employee representation dispute in the railway industry. The only issue before this Court is whether the Court has subject matter jurisdiction to review the representation decision made by the National Mediation Board. After considering all the evidence, the Court is of the opinion that the representation decision is a matter within the exclusive jurisdicton of the National Mediation Board pursuant to the Railway Labor Act, 45 U.S.C. § 151, et. seq. Accordingly, the Motion for Summary judgment should be granted.

Plaintiff, Laurence G. Russell, filed an application for Investigation of Representation Dispute with the National Mediation Board, asking the Board to investigate an alleged representation dispute between himself and the incumbent union, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (BRAC). Following an investigation, the Board determined that a rep-

resentation dispute had not, in fact, arisen between Russell and BRAC, since it found that Russell lacked the intent to represent the subject craft or class of employees if elected. Hence, the Board dismissed Russell's application.

Plaintiffs challenge the Board's dismissal of Russell's application by alleging that the action was unlawful, arbitrary, capricious, an abuse of discretion, in excess of the Board's statutory authority, in violation of plaintiff's constitutional rights under the First, and Fifth Amendments to the Constitution, and contrary to the Board decisions and policy. Further, Plaintiffs allege that the Railway Labor Act, as interpreted by the Board and as applied to Plaintiffs, is unconstitutional because it denies Plaintiffs equal protection under the law and due process of law and violates Plaintiffs' rights of association and expression. Plaintiffs ask this Court for declaratory relief and for an order requiring the Board to conduct an election or to utilize another appropriate method of ascertaining the duly authorized representative of the majority of the employees.

It is well established that the National Mediation Board's decisions regarding representation disputes, made pursuant to Section 2, Ninth of the Railway Labor Act, are not subject to judicial review. *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). There are two limited exceptions to this doctrine of judicial non-review. The first situation allowing review is one in which there are constitutional questions regarding the Board's actions. *Switchmen's Union, supra*, 320 U.S. at 301; *International Brotherhood of Teamsters* v. *Brotherhood of Railway, Airline and Steamship Clerks*, 402 F.2d 196, 205 (D.C. Cir. 1968). The second situation is one in which the Board has acted "in excess of its powers or contrary to a statutory provision." *Sedalia-Marshall-Boonsville Stage Line, Inc.* v. *National Mediation Board*, 574 F.2d 394, 398 (8th Cir. 1978); *Brotherhood of Railway, Airline and Steamship Clerks, supra*, 280 U.S. at 669.

The summary judgment evidence establishes that the Board investigated the question of whether a representation dispute had arisen in this case. The Board's investigation was sufficient and within its scope of authority. Plaintiffs' complaint addresses not the adequacy of the information before the Board, but the Board's conclusion that Mr. Russell lacked the intent to represent the employees. Such a complaint cannot serve as a basis for judicial interference with Board action. *Ruby* v. *American Airlines, Inc.*, 323 F.2d 248, 255 (2nd Cir. 1963).

The Board's investigation met constitutional due process requirements. The Board gave every interested party the opportunity to present its arguments to the Board. Plaintiffs have not claimed that further opportunity was necessary for presentation of additional facts to the Board. The Board made its decision based upon information from every party involved in this action. Such a procedure meets due process requirements. *Ruby, supra*, 323 F.2d at 2544, 255.

Because the Board met its statutory obligation to investigate this matter and did so in a manner that net constitutional due process requirements, this Court has no jurisdiction to review the Board's decision in this matter. Summary judgment should be, and is hereby, GRANTED in favor of National Mediation Board.

It is so ORDERED.

ENTERED this 17th day of March, 1982.

/s/ Mary Lou Robinson
MARY LOU ROBINSON
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1466

LAURENCE G. RUSSELL, WILLIAM L. HANNA
and EDDIE D. LANGWELL,
Plaintiffs-Appellants,

versus

NATIONAL MEDIATION BOARD, THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*,
Defendants-Appellees.

Appeal From The United States District Court
For The Northern District Of Texas

ON SUGGESTION FOR REHEARING EN BANC

U.S. COURT OF APPEALS
FILED
Nov. 28, 1983
GILBERT F. GANUCHEAU
Clerk

(Opinion 09/22/83, 5 Cir., 198__, ____ F.2d ____)
(November 28, 1983)

Before RUBIN and JOLLY, Circuit Judges, and PUTNAM*, District Judge.

PER CURIAM:

(√) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the

Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

*District Judge of the Western District of Louisiana, sitting by designation.

APPENDIX D

Applicable Provisions of the Constitution of the United States of America and the Railway Labor Act 45 U.S.C. § 151, *et seq.*
(not quoted in full in the body of the petition)

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service of time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Railway Labor Act

§ 151

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

§ 151a. GENERAL PURPOSES

The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among

employees or any denial as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. GENERAL DUTIES

First. Duty Of Carriers And Employees To Settle Disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration Of Disputes By Representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of Representatives.

Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice

of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization And Collective Bargaining; Freedom From Interference By Carrier; Assistance In Organizing Or Maintaining Organization By Carrier Forbidden; Deduction Of Dues From Wages Forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

§ 156

Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

APPENDIX E

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

TO THE NATIONAL MEDIATION BOARD,
Washington, D.C. 20572

A dispute has arisen among the employees of The Atchison, Topeka and Santa Fe Railway Company as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Parties To Dispute

Petitioning organization or representative, Laurence G. (Larry) Russell, (An Individual); *Organization holding existing agreement, if any, and date therof*, Allied Services Division (See "A" attached hereto) Date: December 1, 1973; *Other organizations or representatives involved in dispute*, NONE.

Craft Or Class Of Employees Involved

PATROLMEN: (a) Special Agents—203; (b) Security Guards—7; Total—210.

Evidence Of Representation

This application is supported by at least a majority, if the employees are represented.

Signed at Amarillo, Texas this 23rd day of March, 1981

Name Laurence G. (Larry) Russell
LAURENCE G. (LARRY) RUSSELL

Title: An Individual

APPENDIX E-1

NATIONAL MEDIATION BOARD

WASHINGTON, D.C. 20572

CASE NO. R-5198
8 NMB No. 135

In the Matter of the Application of
LAURENCE G. RUSSELL, an individual

alleging a representation dispute pursuant to
Section 2, Ninth, of the Railway Labor Act

involving employees of

ATCHISON TOPEKA & SANTA FE RAILWAY COMPANY

May 21, 1981

FINDINGS UPON INVESTIGATION, DISMISSAL

On March 23, 1981, Laurence G. Russell, an individual, filed an application pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. § 152, Ninth, alleging the existence of a representation dispute involving special agents and security guards employed by the Atchison, Topeka, and Santa Fe Railway Company (Santa Fe). Said employees generally constitute the craft or class of Police Officers below the rank of Captain. The application has been docketed as NMB Case No. R-5198.

At the time the application was filed, these employees were represented by the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employes (BRAC) pursuant to the Board's certification in Case No. R-1091 (1943).

During the course of the Board's investigation, issues arose concerning the applicant's intent to represent the subject craft or class.

Written submissions were received from BRAC, Russell, and the Santa Fe, with respect to the issues presented.

ISSUES

The issue in this case is whether Laurence G. Russell intends to represent the craft or class, if certified, within the meaning of the Act.

CONTENTIONS

Russell contends that he will represent the craft or class if certified, and that the Board cannot inquire into the manner in which such representation will be carried out. Russell further contends that the Board must conduct an election and certify him as the representative, without regard to his intent, if he presents authorization cards from a majority of the eligible employees.

BRAC contends that Russell is attempting to decertify it, and that he has no intention of serving as collective bargaining representative of the craft or class. BRAC further contends that Russell will return the employees to an unrepresented status in violation of the Act. BRAC urges that the application be dismissed.

FINDINGS OF LAW

Determination of the issues here involved is governed by Sections 1 and 2, Title I of the Railway Labor Act, as amended, 45 U.S.C. §§ 151, 152. In this connection, the Board finds as follows:

I.

The Atchison, Topeka, and Santa Fe Railway Company is a carrier as defined by Section 1, First of the Railway Labor Act, as amended, 45 U.S.C. § 151, First.

II.

The subject personnel are employees as defined by Section 1, Fifth of the Act, 45 U.S.C. § 151, Fifth.

III.

BRAC is a labor organization and representative as defined by Section 1, Sixth, 45 U.S.C § 151, Sixth, and Section 2, Ninth, of the Act.

IV.

Section 2, Fourth, of the Act 45 U.S.C. § 152, Fourth, provides employees subject to its provisions ". . . the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

V.

Section 2, Ninth, of the Act requires the National Mediation Board to investigate disputes which arise among a Carrier's employees over representation, and to certify the duly authorized representatives of such employees. In determining the choice of the majority of employees under this section, the Board is authorized to designate who may participate as eligible voters in the event an election is required.

FINDINGS OF FACT

I.

On January 14, 1981, the "Association of Santa Fe Railway Police Officers" sent a letter to the subject employees stating:

> As you may know, or at least be aware of, a move has been started to discertify [sic] from B.R.A.C., Allied Services Division.

The letter proceeded to outline a proposal for forming a new organization, using an individual applicant to request an election. In addition, the letter contained a reference to NMB Case No. R-5039, involving the application of J.J. McDaniel, an individual, to represent Yardmasters on the Santa Fe. *See*, 7 NMB Nos. 149 and 190 (1980); *See also*, File No. C-5062, 8 NMB No. 24 (1980).

On February 22, 1981, the "Association" sent a second letter indicating that Russell had been designated to be the representative who would file the application for investigation of a representation dispute with the Board. The letter went on to describe how the police officers could, like the yardmasters, attain an "exempt employees status." The proposed benefit package is almost verbatim that of the Yardmasters under McDaniel.

On March 30, 1981, a third letter was sent reaffirming the desire to become exempt employees. Russell was one of the signatories to this letter. The letter again discussed the Yardmasters, and went on to refer to the Dismissal of an application filed by J. D. Blankenship, an individual, to represent Dispatchers on the Santa Fe. NMB Case No. R-5150, 8 NMB No. 18 (1980). Blankenship's application was dismissed because his authorization cards sought to "decertify" the incumbent union, and were thus invalid. The letter states that Blankenship's cards would have been used to place the dispatchers in an exempt status.

The March 30 letter continues:

> Some seem to think once we are exempt we must forever remain exempt. To set the record straight, we can go back to a union any time after two years from becoming exempt . . . We did not need the union to get our jobs, and do not feel we need a third party to obtain better benefits for us, some of which are included in our Proposal. The union cannot get these benefits for us.

II.

On April 13, 1981, Chief Hearing Officer David M. Cohen had a discussion with John Cosmic, counsel for Russell in this case. In the course of the discussion, Cosmic indicated that Russell intended to do the same thing that McDaniel did in the case of the Yardmasters, namely, the negotiate an agreement to terminate the collective bargaining agreement then in effect, and to thereafter refrain from engaging in further representation of the employees.

The Chief Hearing Officer advised Cosmic that the Board had stated that the Railway Labor Act, unlike the National Labor Relations Act, does not provide a statutory procedure for decertification of labor organizations, and that the Board was presently investigating three other applicants who had filed on the Santa Fe or its subsidiaries (File No. C-5062). He further stated that the Board might find that Russell's announced intention amounted to a lack of intent to represent the employees, which would be grounds for dismissing the application.

III.

On April 17, 1981, Russell contacted his two U.S. Senators and his Congressman with respect to the converstation between Chief Hearing Officer Cohen and Cosmic, described in Part II, above. Copies of these letters were provided to each member of this Board by Russell.

In his letters, Russell states:

> My campaign has been openly, fairly and legally conducted with the understanding from our group, if elected, the express goal is to negotiate with my employer an agreement that will obtain the status and benefits of non-union employees which are substantially greater than those which we believe cannot be achieved by BRAC.
>
> Most recently my attorney has been advised by the Mediation Board's Chief Hearing Officer that if my intention is to replace BRAC, attempt to negotiate and obtain the status and benefits of other non-union employees rather than to continue to serve indefinitely, unless legally replaced, as a bargaining representative that the Board will not entertain such a move that will allow me to represent and negotiate for my fellow employees, even though a clear majority has signed authorization cards requesting that I do so.
>
> . . . . . .
>
> I do not want any union to interfere in my employment relations and neither does a majority of co-workers. . . .

DISCUSSION

I.

The Railway Labor Act, unlike the National Labor Relations Act, contains no statutory provision for decertification of a bargaining representative. *Atchison, Topeka and Santa Fe Railway Company*, 8 NMB No. 18 (1980). *See also, Manufacturers Railway Company*, 7 NMB Nos. 233 and 250 (1980). The Board will not progress an application for investigation of a representation dispute where the applicant lacks the intent to represent the craft or class, if certified. *Chicago Union Station*, 8 NMB No. 45 (1980), and will dismiss such an application because it is void *ab initio, Id.*

II.

Lack of intent to represent the craft or class may be established in many ways. In the case of J. D. Blankenship, use of the word "discertify" on the cards submitted by the applicant clearly established the true aim of the applicant.

But in other cases, lack of intent may be more subtle. Negotiation of an agreement to abrogate all existing collective bargaining agreements, followed by inaction on the part of the representative, may be evidence of lack of intent. Such an action would leave the employees wages and working conditions subject to the unilateral control of the carrier—the very antithesis of collective bargaining. Failure to provide a grievance procedure under Section 3 of the Act is another indicium of lack of intent.

The Board need not wait to take appropriate action until an applicant has been certified, if the applicant clearly manifests a lack of intent to represent the craft or class at the time the application is filed.

III.

There is no such status as "exempt" under the Railway Labor Act. Personnel of a carrier either are "employees or subordinate officials" or are management officials. "Negotia-

tion" of an exempt status is no more binding upon the Board than any voluntary recognition agreement, and would not constitute a bar to a representation election in a subsequently — filed case. The exempt status sought here is nothing more than a non-union status, which would mean decertification of BRAC.

It is elementary that rank-and-file police officers or guards can never be management officials. Only the highest ranking police officers have been excluded from the craft or class on that basis. For at least forty years, the Board has included sergeants and lieutenants in the craft or class of police officers. *See, e.g., Chicago, Milwaukee, St. Paul & Pacific RR Co.*, 6 NMB No. 1008 (1978); *Belt Railway Co.*, 6 NMB NO. 1198 (1979). Therefore, the subject employees are "employees or subordinate officials" subject to the Act.

IV.

The Board finds that Laurence G. Russell lacks an intent to represent the subject craft or class if elected and certified, as evidenced by his announced and undisputed plan to abrogate all existing collective bargaining agreements, thereby leaving the employees unrepresented *in effect*, notwithstanding the certification and the obligations which attach thereto.

CONCLUSION

On the basis of the findings above, the application of Laurence G. Russell is hereby dismissed, subject to Part 1206.4 of the NMB Rules.

By direction of the NATIONAL MEDIATION BOARD.

/s/ Rowland K. Quinn, Jr.
ROWLAND K. QUINN, JR.
Executive Secretary

Copies to:

Laurence G. Russell
John Cosmic
Fred J. Kroll
F. L. Elterman

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS AMARILLO DIVISION

LAURENCE G. RUSSELL, WILLIAM L. HANNA, and EDDIE D. LANGWELL,

Plaintiffs,

v.

NATIONAL MEDIATION BOARD, ATCHISON; TOPEKA AND SANTA FE RAILWAY COMPANY, and BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHTHANDLERS, EXPRESS AND STATION EMPLOYES,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR REVIEW AND FOR EXTRAORDINARY RELIEF

Plaintiffs, complaining of the Defendants above-named, allege and say as follows:

Introduction

1. This is an action for declaratory and injunctive relief, and for mandamus. The Plaintiffs seek an order requiring the Defendant National Mediation Board to conduct an election to determine the representative authorized by those employees of Defendant Atchison, Topeka and Santa Fe Railway Company who constitute the class or craft generally known as Police Officers below the rank of Captain and to certify the winner of such election as the authorized representative of said employees under the Railway Labor Act, 45 U.S.C. § 151 *et seq*. The Plaintiffs further seek an order enjoining the enforcement of a union shop agreement between the Brotherhood of Railway, Airline and Steamship Clerks, Freighthandlers, Express and Station Employes and the Santa Fe which requires

Plaintiffs to remain members of Defendant BRAC as a condition of their continued employment with the Santa Fe.

Jurisdiction

2. Jurisdiction is conferred by 28 U.S.C. § 1331 which provides for original jurisdiction of all actions arising under the Constitution, laws, or treaties of the United States; 28 U.S.C. § 1337 which provides for original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce; 28 U.S.C. § 1361 which provides for original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff. The Plaintiff seeks declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202, and review of an action of an agency of the United States, pursuant to 5 U.S.C. §§ 702, 705, and 706, and other injunctive relief.

Parties

3. Plaintiff Laurence G. Russell is a resident of the State of Texas who has been authorized by a majority of those employees of the Defendant Atchison, Topeka and Santa Fe Railway Company who constitute the class or craft of Police Officers below the rank of Captain to represent their interests under the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*

4. Plaintiffs William L. Hanna and Eddie D. Langwell, together with Plaintiff Russell, are employees of the Defendant Atchison Topeka and Santa Fe Railway Company in Amarillo, Texas, and are members of that craft or class of employees known as Police Officers below the rank of Captain. Plaintiffs Hanna and Langwell have signed cards authorizing Plaintiff Russell to represent them.

5. Defendant National Mediation Board (hereinafter "the board") is an agency of the United States entrusted with administering certain portions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* and is specifically required, pursuant to 45

U.S.C. § 152 Ninth, to investigate any dispute arising among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirement of the Railway Labor Act, to certify to the parties to the dispute the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and to certify the same to the carrier.

6. Defendant Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter "BRAC") is a labor organization and representative as defined by § 1, Sixth of the Railway Labor Act, 45 U.S.C. § 151 Sixth, and currently claims to be the representative of the employees in question pursuant to the Board's certification in NMB Case No. R-1091 (1943).

7. Defendant Atchison, Topeka and Santa Fe Railway Company (hereinafter "Santa Fe") is a carrier as defined by § 1, First of the Railway Labor Act, as amended, 45 U.S.C. 151, First, and is the employer of the employees in question.

First Cause Of Action

8. On March 23, 1981, Plaintiff Russell filed with the Board an application pursuant to § 2, Ninth, of the Railway Labor Act, as amended, 45 U.S.C. § 152, Ninth, alleging the existence of a representation dispute involving special agents and security guards employed by the Santa Fe. Said employees generally constitute the craft or class of Police Officers below the rank of Captain. The application was docketed as NMB Case No. R-5198. A copy of the application is attached hereto, labeled Exhibit A-1, and incorporated herein by reference. In support of his application, Plaintiff Russell provided evidence of representation in the form of proved authorizations from a substantial majority of the craft or class in question. Pursuant to the Board's request, Plaintiff Russell supplemented his application by letter dated March 27, 1981 and an attachment thereto listing additional employees who had provided him with authorizations. A copy of this letter and list is attached

hereto, labeled exhibit A-2, and incorporated herein by reference. The foregoing is in compliance with the Board's Rules for Handling Representation Disputes Under the Railway Labor Act, Part 1206.2(a) NMB Rules, 29 C.F.R. § 1206.2(a), which are promulgated by the Board under authority of 45 U.S.C. § 151 *et seq.* and which read, in part, as follows:

> 2(a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national scope and are covered by a valid existing contract between such representative and the carrier a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of § 2, Ninth, of the Railway Labor Act.

9. Plaintiff Russell has complied with every rule and regulation promulgated by the Board with which compliance may be necessary as a condition precedent to the Board's determination of the representation desires of the employees in question.

10. The craft or class of Police Officers on the Santa Fe is composed of approximately 210 special agents and security guards. The craft or class of Police Officers, at the time Plaintiff Russell's application was filed, was represented by BRAC pursuant to the Board's certification in Case No. R-91 (1943). To the best of the Plaintiffs' knowledge and belief, no current employees in the craft or class of Police Officers participated in the election which resulted in the Board's certification. The employees, including the Plaintiffs herein, are also required by an agreement between the Santa Fe and BRAC, authorized by Section 2, Eleventh, 15 of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, to become members of BRAC as a condition of their continued employment with the Santa Fe.

11. The majority of the employees constituting the craft or class of Police Officers no longer authorizes BRAC to repre-

sent those employees concerning their affairs with the Santa Fe.

12. Plaintiff Russell has demanded that Defendant Santa Fe recognize him as the representative of the employees in question and that all rights under the existing agreement between the Defendants Santa Fe and BRAC, including dues deducted from the paychecks of the employees in question, be transferred to Plaintiff Russell.

13. On May 21, 1981, the Defendant National Mediation Board issued its Findings Upon Investigation and Dismissal, 8 NMB No. 135, a copy of which is attached hereto, labeled Exhibit B, and incorporated herein by reference.

14. In refusing to conduct the election and dismissing the application, the Board has unlawfully withheld from the Plaintiffs their right for a determination of whether Plaintiff Russell or Defendant BRAC is authorized by the majority of the employees with the craft or class; the action of the Board is arbitrary, capricious, an abuse of discretion, and is otherwise not in accordance with the Railway Labor Act, 45 U.S.C. § 151 *et seq.* and other law; the Board's actions and policy are contrary to the Constitution in that it violates rights guaranteed to the Plaintiffs by the First and Fifth Amendments of the Constitution; it is in excess of the statutory authority granted to the National Mediation Board under the Railway Labor Act; and the action of the Board is without observance of procedure required by law and directly contrary to Board decisions and policy which had been in existence for a number of years.

15. The Railway Labor Act, 45 U.S.C. § 151 *et seq.*, as interpreted by the Board and as applied to the Plaintiffs, is unconstitutional in that it denies Plaintiffs equal protection under the law and due process of law in violation of the Fifth Amendment of the Constitution of the United States by depriving the employees in question of their right to reject representation of the Defendant BRAC, and requires them to be represented for purposes of collective bargaining, against their will and the will of the majority of the other employees

concerned, while other employees similarly situated are not so required.

16. The Railway Labor Act, 45 U.S.C. § 151 *et seq.*, as interpreted by the Board and as applied to the Plaintiffs, is unconstitutional in that it violates Plaintiffs' rights of association and expression protected under the First Amendment of the Constitution by requiring them to associate with a representative in perpetuity although the majority of the craft or class no longer authorizes an individual or organization to be its representative.

Second Cause Of Action

17. Paragraphs 1 through 16 of the Complaint are realleged as if fully set forth herein.

18. The Union Security Clause in effect between Defendant Santa Fe and the Defendant BRAC violates the Plaintiffs' rights of freedom of association and expression guaranteed under the First Amendment of the Constitution in that they are required as a condition of continued employment with the Santa Fe to remain members of BRAC and make financial contributions towards BRAC although BRAC is no longer authorized by the majority of the employees of the craft or class to be their representative.

WHEREFORE, Plaintiffs pray as follows:

A. That this Honorable Court issue its order declaring that the action of the National Mediation Board is unlawful, arbitrary, capricious, an abuse of discretion, in excess of its statutory jurisdiction and authority and violative of the rights of the Plaintiffs guaranteed by the First and Fifth Amendments of the Constitution, and that the Railway Labor Act 45 U.S.C. § 151 *et seq.* is unconstitutional as applied to the Plaintiffs.

B. Issue its Writ of Mandamus or other appropriate order requiring the National Mediation Board to conduct an election or to utilize another appropriate method of ascertaining the

duly authorized representative of the majority of the employees of the Defendant Santa Fe who constitute the class or craft of Police Officers and to certify the same to the plaintiff and the Defendant BRAC, and the Defendant Santa Fe in accordance to the Railway Labor Act, as amended, 45 U.S.C. § 151 *et seq.*

C. Issue its order declaring that the Union Shop Clause currently existing between the Defendant Santa Fe and the Defendant BRAC violates rights guaranteed to the Plaintiffs by the First and Fifth Amendments of the United States Constitution, and is therefore null and void.

D. Issue its order enjoining the Defendant Santa Fe and the Defendant BRAC, their agents and employees, and all other persons acting in concert with them, from enforcing the Union Shop Clause against the Plaintiffs, or otherwise depriving them of their rights guaranteed them under the First Amendment.

E. Award the Plaintiffs reasonable attorney's fees and the costs of this action.

F. Grant such other and further relief as to this Court may seem equitable and proper.

/s/ John Cosmic
JOHN COSMIC
910 Barfield Building
Amarillo, Texas 79101
(806) 373-0711

DANNIE B. FOGLEMAN
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

July 22, 1981

Exhibit A-1*

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

TO THE NATIONAL MEDIATION BOARD,
Washington, D.C. 20572

A dispute has arisen among the employees of The Atchison, Topeka and Santa Fe Railway Company as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Parties To Dispute

Petitioning organization or representative, Laurence G. (Larry) Russell, (An Individual); *Organization holding existing agreement, if any, and date thereof*, Allied Services Division (See "A" attached hereto) Date: December 1, 1973; *Other organizations or representatives involved in dispute*, NONE.

Craft Or Class Of Employees Involved

PATROLMEN: (a) Special Agents—203; (b) Security Guards—7; Total—210.

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*The list of applicable employees attached hereto has been omitted for reasons of space.

Evidence Of Representation

This application is supported by at least a majority, if the employees are represented.

Signed at Amarillo, Texas this 23rd day of March, 1981

/s/ Laurence G. (Larry) Russell
LAURENCE G. (LARRY) RUSSELL

Title: An Individual**

**Plaintiff's Exhibit A-2, containing a letter and an additional list of applicable employees, has also been omitted for this reason. And Exhibit B to the Amended Complaint has been omitted as it is reproduced herein as Exhibit E-1.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Civil Action No. 2-81-138

LAURENCE G. RUSSELL, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Defendants.

DEFENDANT NATIONAL MEDIATION BOARD'S ANSWER

Defendant National Mediation Board, by its undersigned attorneys, answers the Amended Complaint as follows:

First Defense

The Court lacks jurisdiction over the subject matter of this case.

Second Defense

The Amended Complaint fails to state a claim upon which relief can be granted.

Third Defense

In answer to the numbered paragraphs of the Amended Complaint, defendant National Mediation Board hereby admits, denies, and alleges as follows:

1. This paragraph contains plaintiffs' introductory remarks and not allegations of fact to which an answer is required, but insofar as an answer may be required, denied.

2. This paragraph contains plaintiffs' jurisdictional allegations and not allegations of fact to which an answer is required, but insofar as an answer may be required, denied.

3. Denied, except to state that defendant National Mediation Board is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning plaintiff Russell's residency.

4. Defendant National Mediation Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of this paragraph. The second sentence is denied, except to admit that defendant National Mediation Board has authorization cards purportedly signed by plaintiffs Hanna and Langwell but that it has not verified these signatures.

5. Denied, except to admit that defendant National Mediation Board is the federal labor relations agency which administers the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and is charged with certain responsibilities concerning disputes as to employee representation under Section 2, Ninth of the Act. 45 U.S.C. § 152, Ninth. The Court is referred to the Railway Labor Act for a full and complete statement of its contents.

6. Admitted.

7. Admitted.

First Cause Of Action

8. Sentences one, two, three, four, and seven of this paragraph are admitted. All other allegations in this paragraph are denied.

9. Denied.

10. The second sentence of this paragraph is admitted, except to state that the Board's certification occurred in Case No. R-1091. Defendant National Mediation Board is without knowledge or information sufficient to form a belief as to the truth of the first, third, and fourth sentences.

11. Defendant National Mediation Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

12. Admitted, upon information submitted to this Court by defendant Santa Fe in its Motion for Leave to Deposit Funds with the Court.

13. Admitted.

14. Denied.

15. Denied.

16. Denied.

Second Cause Of Action

17. The answers to paragraphs 1 through 16 of the Complaint are incorporated herein as if fully set forth.

18. Defendant National Mediation Board is without knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph, except to state that BRAC is the certified representative of these employees.

The National Mediation Board hereby specifically denies all the allegations of the Amended Complaint not herein before otherwise admitted.

WHEREFORE, defendant National Mediation Board, having fully answered, prays that this action be dismissed with prejudice and that it be granted its costs and attorney's fees.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

JAMES A. ROLFE
United States Attorney

/s/ Sandra M. Schraibman
SANDRA M. SCHRAIBMAN

/s/ Ann M. Sheadel
ANN M. SHEADEL

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APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

NO. CA 2-81-138

LAURENCE G. RUSSELL, *et al.*,
Plaintiffs,

v.

NATIONAL MEDIATION BOARD, *et al.*,
Defendants.

BRAC'S ANSWER TO THE COMPLAINT AND CROSSCLAIM

The defendant, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (herein BRAC), by its attorneys, in answer to the complaint states as follows:

FIRST DEFENSE

The Court lacks subject matter jurisdiction to entertain this action.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

BRAC answers the enumerated paragraphs of the complaint as follows:

1. The first paragraph of the complaint contains conclusory and argumentative allegations and therefore no responsive pleading on BRAC's part is required.

2. BRAC denies the allegations of paragraph 2 of the complaint and further answering BRAC states that judicial review of a National Mediation Board (NMB) representation decision under Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth, is precluded.

3. BRAC is without knowledge or information sufficient to form a belief as to plaintiff Russell's residency and BRAC denies the remaining allegations of paragraph 3 of the complaint. Further answering BRAC states that at all times material it is, has been and continues to serve as the certified bargaining representative for the craft or class of patrolmen employed by the Atchison, Topeka and Santa Fe Railway Co. (Santa Fe).

4. BRAC admits the first sentence of paragraph 4 but is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence.

5. BRAC admits that the NMB is an agency of the United States whose powers, functions and responsibilities in a representation matter are prescribed in Section 2, Ninth of the Railway Labor Act, 45 U.S.C. § 152, Ninth. BRAC denies the remaining allegations of paragraph 5.

6. BRAC admits the allegations of paragraph 6 of the complaint and further answering states that its status as exclusive bargaining representative is a fact by virtue of NMB certification.

7. BRAC admits the allegations of paragraph 7.

8. BRAC admits the allegations contained in the first four sentences of paragraph 8 of the complaint and denies the allegations in the fifth sentence of paragraph 8, except that BRAC admits that NMB has promulgated the regulation cited in paragraph 8. Further answering BRAC states that any authorization cards that may have been procured by Russell were done with encouragement, assistance, inducement and coercion of the Santa Fe in violation of Sections 2, Third, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. § 152, Third, Fourth and Ninth.

9. BRAC denies the allegations of paragraph 9.

10. BRAC admits the first two sentences of paragraph 10 and is without knowledge or information sufficient to form a belief as to the truth of the allegations of the third sentence thereof. BRAC admits the allegations of the last sentence of paragraph 10, and further answering states that the membership obligation imposed by the union security agreement satisfies constitutional and statutory requirements.

11. BRAC denies the allegations of paragraph 11 of the complaint.

12. Upon information and belief, BRAC admits the allegations of paragraph 12 of the complaint but further answering states that any demands by Russell for recognition and for deducted dues were made as a result of illegal assistance, inducement, coercion and interference by Santa Fe in violation of Sections 2, Third, Fourth, Ninth and Eleventh of the Railway Labor Act.

13. BRAC admits the allegations of paragraph 13 of the complaint.

14.-16. BRAC denies the allegations and each of them of paragraphs 14, 15 and 16 of the complaint.

17. BRAC realleges and incorporates by reference its answers to paragraphs 1 through 16, inclusive, in answer to paragraph 17 of the complaint.

18. BRAC denies the allegations of paragraph 18 of the complaint.

WHEREFORE, the complaint should be dismissed with prejudice and costs taxed against plaintiffs.*

Robert S. Sugarman
ROBERT S. SUGARMAN

Stephen B. Horwitz
STEPHEN B. HORWITZ
Attorneys for BRAC

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*BRAC's pleadings on Santa Fe's Crossclaim for Interpleader have been omitted as well as BRAC's Exhibit A to its Answer for reasons of space.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO.
CA-2-81-138

LAURENCE G. RUSSELL, WILLIAM L. HANNA,
and EDDIE D. LANGWELL,

Plaintiffs,

VS.

NATIONAL MEDIATION BOARD, THE ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY, and
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Defendants.

ORDER OF DISMISSAL

IT IS ORDERED that the claim of Plaintiffs LAURENCE G. RUSSELL, WILLIAM L. HANNA and EDDIE D. LANGWELL against Defendant THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY be, and the same is, hereby dismissed.

DATED This 20th day of August, 1982.

/s/ Mary Lou Thompson
MARY LOU THOMPSON
UNITED STATES DISTRICT JUDGE PRESIDING

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

CIVIL ACTION NO.
CA-2-81-138

LAURENCE G. RUSSELL, WILLIAM L. HANNA,
and EDDIE D. LANGWELL,

Plaintiffs,

vs.

NATIONAL MEDIATION BOARD, THE ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY, and
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Laurence G. Russell, William L. Hanna and Eddie D. Langwell hereby appeal to the United States Court of Appeals for the Fifth Circuit from the March 17, 1982 order granting defendant National Mediation Board's Motion for Summary Judgment on the grounds of lack of subject matter jurisdiction.

This order became final and appealable upon the subsequent final orders of this Court dismissing the defendant Atchison Topeka and Santa Fe Railway Company (Santa Fe) on August 20, 1982, and the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and State Employees (BRAC), on August 27, 1982. The dismissal of the Second

Cause of Action against defendants Santa Fe and BRAC is *not* being appealed.

Respectfully submitted this 2nd day of September, 1982.

/s/ Robert F. Gore
ROBERT F. GORE
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